22

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted]1912.

No. [redacted]11.

AUGUSTO BURNET, APPELLANT,

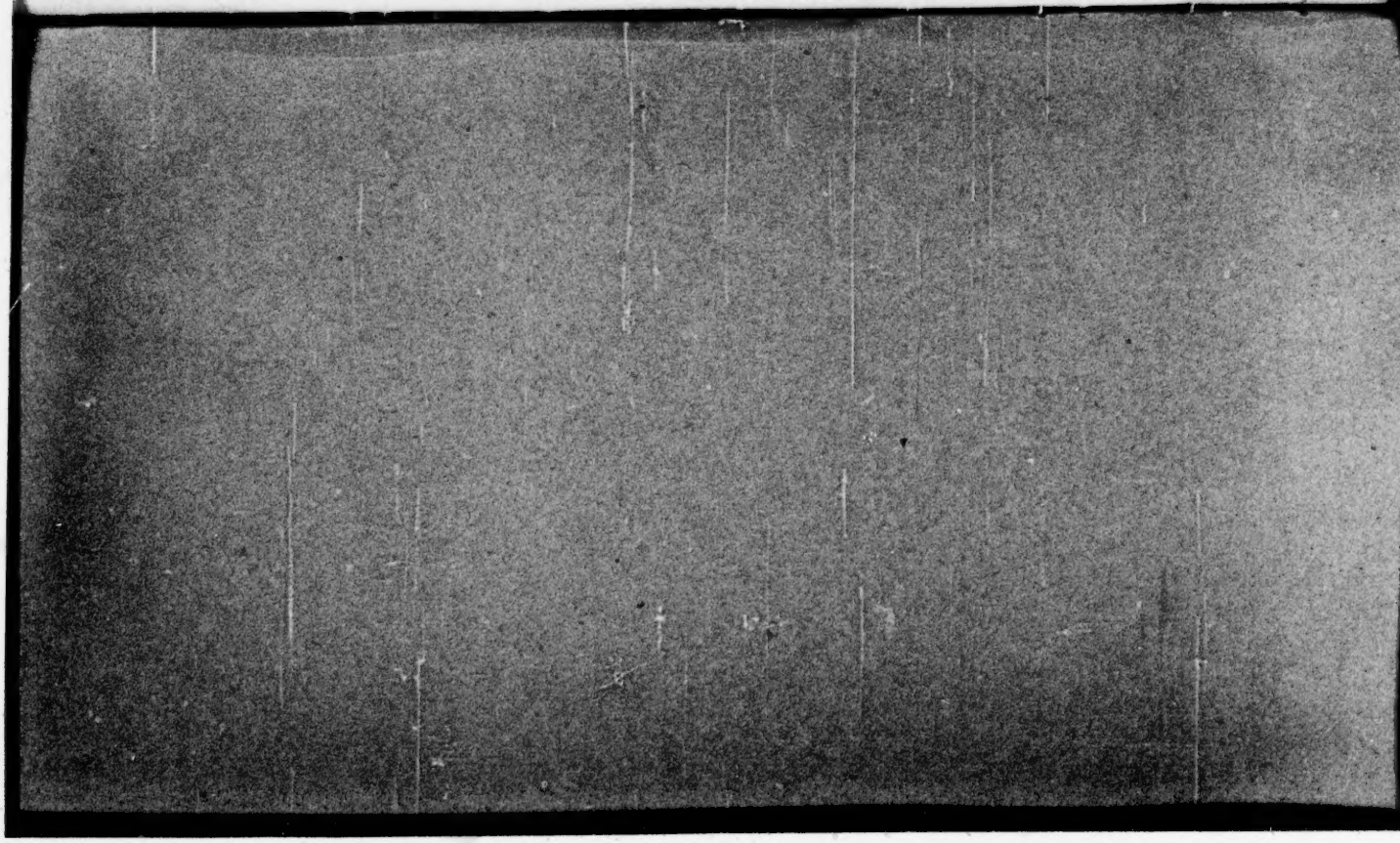
vs.

JOSEFA AND ISABEL DESMORNES Y ALVAREZ.

APPEAL FROM THE SUPREME COURT OF PORTO RICO.

FILED SEPTEMBER 21, 1909.

(21,832.)



(21,832.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

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AUGUSTO BURNET, APPELLANT,

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JOSEFA AND ISABEL DESMORNES Y ALVAREZ.

APPEAL FROM THE SUPREME COURT OF PORTO RICO.

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1 Year 1906. Number 101.

Supreme Court of Justice of Porto Rico.

Civil.

Title of the Case.

ISABEL Y JOSEFA DESMORNES, Plaintiffs and Appellants,
vs.
THE UNKNOWN HEIRS OF ADOLFO DESMORNES, Defendants and Appellees.

Appeal from the District Court for the Judicial District of Humacao.

Recognition of Filiation.

2 I, Juan F. Vías Ochoteco, declare under oath:

I.

That I brought an action in the District Court of Humacao, on behalf of Isabel y Josefa Desmornes, against the unknown heirs of Adolfo Desmornes, for recognition of filiation, in which action a sentence was rendered on the 20th of August last, by which sentence the Court dismissed the complaint, condemning the plaintiffs to pay the costs.

II.

That the plaintiffs took an appeal from said sentence in form and manner on the 15th of September last, and such appeal has not been filed as yet with the Supreme Court of Porto Rico, owing to the fact that copy of the record has not been made, nor has the brief of the case been approved by the lower Court, which brief was filed by the plaintiffs.

III.

That this delay, is not owing to the appellants, who, through their Counsel have made incessant efforts near the Secretary of the Court, and up to this date, the said official has not been able to issue the copy of the record above mentioned, owing to occupations he claims he has.

IV.

That the appellants need an extension of time of at least forty days, in order to save their right, said extension of time being considered necessary and just to the ends of Justice.

And in proof that the foregoing is the truth, I sign the same at Humacao on the first day of October 1906.

(Signed) JUAN F. VIAS.

Sworn to and subscribed before me, this first day of October, 1906.

(Signed) R. TIRADO,
Municipal Judge.

3 In the Supreme Court of Porto Rico.

JOSEFA E ISABEL DESMORNES
versus
THE UNKNOWN HEIRS OF ADOLFO DESMORNES et al.

Action for Recognition of Filiation.

Josefa E. Isabel Desmornes, through their lawyer Juan F. Vias Ochoteco, appear before this Honorable Court and allege:

I.

That the petitioners are the appellants in the above entitled cause, on account of the fact that the sentence rendered by the Honorable District Court of Humacao, was adverse to them, and an appeal in form and manner having been taken from said sentence on the fifteenth of September last.

II.

Your petitioners need an extension of forty days for the purpose of obtaining and presenting the copy of the record and other documents the Law requires when appeals are taken, they basing their request for this extension, as is set forth in the attached affidavit.

And your petitioners pray Your Honorable Court to grant an extension of forty days, for the purposes above mentioned.

Humacao for San Juan, October 1, 1906.

Respectfully, JUAN F. VIAS,
Attorney for the Appellants.

I, Juan F. Vias Ochoteco, duly sworn, say: That I am the Attorney for the petitioners in the above motion, and what is stated therein, is the truth and nothing but the truth, which I know of my own knowledge, the parties interested not signing herewith because they are out of this District.

Humacao, October 1, 1906.

JUAN F. VIAS.

Subscribed and sworn to before me this first day of October, 1906.

R. TIRADO,
Municipal Judge.

Filed in my office on this fourth day of October of 1906.

———— ————,
Secretary of Supreme Court of Porto Rico.

4 San Juan, Porto Rico, on the fourth day of October, nineteen hundred and six.
As requested: extension of time only granted for twenty days.
It was so decided by the Court and the President rubrics, I sign.
There is a rubric.

A. F. CASTRO.

In the Supreme Court of Porto Rico.

ISABEL Y JOSEFA DESMORNES
vs.
THE UNKNOWN HEIRS OF ADOLFO DESMORNES.

Filiation.

To the Honorable the Supreme Court:

Isabel y Josefa Desmornes, through their Attorney Juan F. Vías, appear before this Honorable Court, and respectfully allege:

I.

That they are the appellants in the above entitled case, having exercised their right of appeal in time and form, according to an affidavit filed with Your Honorable Court to support a petition for an extension over that which the Law grants, to present the copy of the records.

II.

That this formality had not been complied with until now, because, neither had the Secretary of the District Court of Humacao been able to furnish the copy of the record nor had the Honorable Judge of that Court approved the statement of the case, although it was presented in due time.

For all of which your petitioners beg the Honorable Supreme Court of Porto Rico, that an additional extension of time be granted them, of forty days, so that the copies indispensable to support the appeal presented can be prepared.

Vieques for San Juan, October 15, 1906.

JUAN F. VIAS,
Attorney for the Appellants.

5 I, Juan F. Vías, duly sworn, declare: That I am the Attorney for the Appellants in the above cited cause and that the reasons stated in the foregoing motion are the truth and nothing else but the truth, which is known to me of my own knowledge, the

parties hereto not signing this petition because they are not residents of this Judicial District.

Vieques, October 15, 1906.

JUAN F. VIAS.

Sworn to and subscribed before me this 15th of October, 1906.

R. TIRADO,
Municipal Judge.

Filed in my office on this 22nd day of October, 1906.

A. F. CASTRO,
Secretary of the Supreme Court of Porto Rico.

San Juan, Porto Rico, October 23rd, nineteen hundred and six.

As requested. It was resolved by the Court and the President thereof rubrics to which I certify:

Rubric as stated.

A. F. CASTRO.

In the Supreme Court of Porto Rico.

ISABEL Y JOSEFA DESMORNES, Plaintiffs and Appellants,
versus
UNKNOWN HEIRS OF ADOLFO DESMORNES et al., Defendant and Appellee.

Action for Recognition of Filiation.

Attorney for Appellants: Juan V. Ochoteco.
Attorney for Appellees: Henry F. Hord.

Motion of the Appellee.

The Appellee, A. Burnet, represented by his Attorney, Henry F. Hord, respectfully represents:

That the sentence appealed from was rendered in this cause on August 20, 1906, and that this case is not one where the "record" is voluminous or of difficult preparation, and notwithstanding this, the appellants, without notifying this party, have solicited and obtained from the Honorable Court two extensions within which to present said "record," which extensions together with the time fixed by Rule 50 of that Court, give them eighty days for that purpose, or, until December 18, 1906.

6 The Appellee states that the record in this case only would require about, three days for its preparation, and in view of the extensions already granted the Appellants without notification to the Appellee, the latter prays your Honorable Court that no further extensions be granted without first giving notification to this party

and the opportunity to oppose such extensions, as on the contrary grave prejudice would result to the interests of the latter.

San Juan, Porto Rico, November 5, 1906.

HENRY F. HORD,
Attorney for the Appellee.

Filed in the Office of the Secretary of the Supreme Court on November 5th, 1906.

San Juan, P. R., November 5th, nineteen hundred and six: Attach to the record. It was so ordered by the members of the Court, and the President, rubrics, to which I certify:

The rubric is stated.

A. F. CASTRO.

In the District Court in and for the Judicial District of Humacao.

JOSEFA É ISABEL DESMORNES
versus
THE UNKNOWN HEIRS OF ADOLFO DESMORNES.

Action for Recognition of Filiation.

Statement of Facts.

Isabel y Josefa Desmornes, through their Attorney Juan F. Vías Ochoteco, present the following statement of facts:

The case above referred to began with a complaint established by Isabel y Josefa Desmornes, against the Unknown heirs of Adolfo Desmornes, to obtain from the Court a sentence by which the plaintiffs should be declared natural daughters, recognized or illegitimate, of Adolfo Desmornes.

When the decree was published calling those persons (unknown) who considered themselves with right to object to the pretentions of the plaintiffs, Mr. August Burnet came forth and answered the complaint, through his attorneys Hawkins and Hord.

7 This case was set for a hearing on the 29 of July of this year, in regular order, for the holding of the trial, and this was held, proofs were received and the informations of the parties were heard, intervening the Prosecuting Attorney in behalf of the People of Porto Rico. The Court reserved its decision.

On the 20th of August, the Court rendered its decision declaring that the law and the facts were against the plaintiffs and based said decision, as can be seen in the copy attached to this record, principally, upon the fact that the recognition had not taken place prior to the enforcement of the Civil Code of Porto Rico, either expressly or tacitly.

When the trial took place the defendants introduced no proof and the plaintiffs introduced the following evidence:

Testimony of Witnesses.

José A. Vera: This witness appears and after having been duly sworn declares: That he is Col-ector of Internal Revenue at Vieques, and knows Adolfo Desmornes, on account of the fact that in the performance of his duties, Mr. Desmornes came to his office to see what taxes he owed, he gave him a note of same and he said: "Well I will send my daughter to pay them and within a few days later his daughter came around and took the receipt." That his daughter was called Pipia and he believes her right name was Josefina: That the latter took the receipt and paid the first semestre (6 months) and the- for the second receipt came a Mr. Torres sent by her who is at Vieques Island about 9 months now and that this happened in the month of October and cannot state exactly the day. That this conversation took place in the Office of the Col-ector and that next morning Mr. Desmornes was already sick. That he arrived at Vieques at the end of September and before then he neither knew Desmornes or Pipia. That Desmornes came to his office and said: I want to know the amount of taxes I owe: I gave him a note and then he said: I will send my daughter later to pay them: That nearly all the proprietors came frequently to his office, except those who are wealthy that can send somebody else for them: That the proprietors themselves pay the receipts and that there are
8 some of them who give orders that their receipts be taken to someone else, he citing some of them, that he was alone when that conversation took place. In behalf of the People of Porto Rico appears the Prosecuting Attorney and the witness continues deposing. That he thought it was Desmornes' daughter because when she came she said: I come to get Desmornes' receipt.

Deposition of Witness Guillermo Carreras.

This witness appears: physician: after being duly sworn, he declares: That he was well acquainted with Desmornes because he was his doctor, rendering his services to him for four years: That during his illness, he was attended by his daughter Isabel he knowing this first off, because she was his daughter, and secondly, because she was attending to him: That Desmornes directly called his attention to this: That during his last illness which was of five months he attended him daily and advised him to fix his matters to which Desmornes replied: I have no matters to fix Doctor: as I have no other heir except my daughter Isabel: That Isabel lived in the same with Desmornes and in his last illness of five months he always saw her at his side assisting him constantly: That one day, he cannot state exactly, when he saw that he was seriously ill he called his attention to the matter of fixing his things, and deponent intended to send for a Notary: That he was acquainted with Desmornes for 6 years, assisting hi min his divers illess- and especially in the last one, which had a duration of 5 months: That he believes Desmornes did not testate because he had his daughter,

who would take possession of his property: That he advised Desmornes several times to testate, last off when he thought his illness had no cure, and last off, five days before his death, so he told him two or three months before, and five days immediately preceding his death: The first time, because it is his custom to say this indirectly, and lastly, he told him frankly; that five or six times he spoke to him about the same matter, he always answered that he had no other heir but his daughter and he even said more to the deponent: as he said "should I die to-morrow, — is in charge of protecting my
9 daughter Isabel in anything that might happen to her: That he believes that in that occasion Mr. Antonio Torres y Portela was present, he being of the opinion that when Torres heard the conversation it was in the afternoon, although he is not sure. That the daughter was present some times and at others she was not: That he remembers that the last time he told him to fix his things, he said: "You are going to die, fix your things": That between Desmornes and Isabel no contract existed to go to live there, but that she did it because she is the daughter of Desmornes according to the statements of the latter and on account of nothing else but that: That he thinks he heard Desmornes say that he had called his daughter to assist him: That De-mornes' actions towards Isabel during his illness was that of father as regards daughter and of her as regards a daughter towards a father, as he has seen rare cases:

Deposition of Antonio Torres.

Antonio Torres, merchant of Vieques, duly sworn says: That he was acquainted with Desmornes for a long time, from twenty to twenty five years, treating him with much affection: That according to what they told him, Desmornes had left four daughters called, Pipia, Isabel Desmornes, another Jedem and another small one of eight years of age whom they call "the madama": that Pipia and Isabel Desmornes were considered as daughters by Adolfo Desmornes, to the extent that they assisted him during his illness: That Desmornes gave him orders to give them money and what they needed in the store, Don Adolfo settling for these accounts: That the former called them by their names, told him that they were his daughters and said: "give my daughter so and so, so much": That he knew Desmornes' hand-writing well, from whom he had received an order, to be delivered to Isabel.

Attorney Vias presents several letters to be recognized by the witness. The witness continues deposing and says that the hand-writing of those letters is of Desmornes. The prosecuting attorney says he retires from the trial because he is not interested in the case as a representative of the People. Witness continues
10 saying that the hand-writing and the signature is that of Adolfo Desmornes. That he was always a single man. That Desmornes more frequently visited deponent's house. That he heard Dr. Carreras, at various times, advising him to make testament, because death would come in at any time, and Desmones would answer, that he did not have any more heirs than Isabel

Desmornes: That he had others but that he did not recognize them, only Isabel Desmornes; he had Isabel and Josefa always in the house as daughters, and they assisted him in his illness, during which illness Desmornes treated them with affection and Isabel treated him as a daughter regarding a father not leaving him alone during such illness. That he examined said letters and knows that the hand-writing is of Desmornes, because at many times he would write on the counter of deponent's store or on the desk and he was accustomed to know the writing, having seen him write his name many times: That examining Desmornes' signature he found that sometimes he would scribble and others he would slant his hand-writing: That Desmornes said that Pipia was recognized in the church: that he write his name many times. That he can swear that if the signature on the letters is not that of Desmornes, it is identical. That Desmornes told him that the only recognized daughter he had was Pipia, and that she would take care of giving the rest something: That before he has not seen the letters, and sees them to-day for the first time: That the Doctor told Desmornes, to straighten his things out in case he should die and he replied, that he had no other recognized child than Isabel Desmornes, that he did not have to make testament, that she knew that there were other brothers (sisters) and that she would give them their participation, that Desmornes said that Pipia was recognized in the church: that he told him that when deponent had his second Daughter he being called to the court to register said daughter and at that time Desmornes said: "I don't have to do that because my daughter is there (meaning registered) of anterior date: That he never heard Desmornes say that he had a nephew as heir.

11 *Deposition of Avelino Portela.*

After being duly sworn, he declared: That he is a merchant and resident of Vieques and was acquainted with Desmornes for about nine years. That when the former died he had the daughters. He knows it because the people said so and Desmornes himself: That those daughters are Pipia, Isabel, Jedú and a smaller one: that he had heard Desmornes say so himself: That they were daughters of different mothers and by order of Desmornes he gave them something: That deponent was called by Desmornes' daughter Isabel to the former's house and when there Desmornes told him to dispatch certain merchandise to his daughters Isabel and Josefa and he did so: That said merchandise was paid for by Antonio Torres on behalf of Desmornes, the former a friend of the latter: That he knows the hand-writing of this man because he has seen it several times, on the time book, where Desmornes himself made the entries: That the hand-writing of the letters presented to him is Desmornes', who he saw writing in that same manner. That he visited Desmornes during his last illness when Isabel and Josefa were in attendance upon him, Desmornes treating them as his daughters, and they considered Desmornes as father: That Desmornes stated to Dr. Carreras, his daughters, Antonio Torres and deponent that

was not necessary (referring to testament) that he had time to fix that up: That Desmornes told him that personally: That Desmornes knew that he had daughters, as he stated this, while sick, furthermore, stating that Pipía was his only daughter, the one he loved most and distinguished most, it being his desire that she take everything. That Pipía attended Desmornes since he became ill up to the time of his death, on account of which deponent thought he was angry with the others, although he saw Josefa and his other daughters there helping out and the smallest one several times. Pipía did for her father what can be expected of a good daughter; he recognizes Desmornes' signature, notwithstanding the fact he did not see him write his name, but he saw him write the entries in his time book and it is the same hand-writing.

Testimony of Emilio Gomez.

12 This witness duly sworn, says: He is a proprietor of Vieques, knows Desmornes, three years more or less: That he had no wife: That he was always at deponent's house and he told him that he had three daughters, and later told him that he had another small one, a negro: That one of said daughters is called Jedú, another Josefa, another Delfina, and the other the smallest of about eight years of age: That Josefa was at Patillas and the other in San Juan and that Desmornes showed him their letters, asking him for money and other things That the deponent was always at Desmornes' house and he knows his writing because he showed him sometimes his books and he sweurs that the writing of the letters is his and his signature and those signatures which read 'Adolfo' are his. That before Desmornes became ill, Josefa came to Vieques and asked him for money, and Desmornes gave her four beasts (either horses, or cattle) to be sold in Patillas. That when he became ill they wrote to his other daughter Pipia, to come and assist him, and they also called Josefa by a telegram. That Isabel assisted him assiduously and was the only one to render any aid. Desmornes considered them all, including the smallest eight years of age, as his daughters, but more so as regards Pipia, because she attended to him with more diligence: That (declarante—meaning deponent—should say—That Desmornes) had four daughters, to wit, Pipia, whose right name is Isabel Desmornes, another Josefa, Delfina, who is called Jedú and the other he does not know her name; that Delfina called Pipia by telegraph, having been ordered so to do by Desmornes: That when Pipía was not there Desmornes was assisted by the mother of the smallest one; that deponent is a merchant and works for Duteil & Julbe, a store situated very near where Desmornes lived.

Deposition of Juan Bautista Martinez.

This witness being duly sworn declares: That he resides at Vieques for 56 years, and was well acquainted with Desmornes, who was his intimate friend; that Desmornes has had children: one called

Pipia, which he had with a woman that lived in the deponent's house: that said woman was a relative of his wife; that Des-
13 mornes took the woman to his house in the plantation; that there was another daughter of another woman called Gedú, and the people called her Gedú; that Desmornes went to his house frequently and he sat there with the boys and with Pipia, with the mother of Pipia and the wife of the deponent; that he heard Desmornes talk about his children; Desmornes during his illness called him from Puerta de Tierra, where he was working and when he arrived he said: "Tell Pipia to come to me"; that Desmornes spoke to him about the other daughters and the one called Gedú was the daughter of a woman that was hired at Desmornes's mothers' house and that one d[illegible] the latter called the deponent and told him that that woman was pregnated by her son; that Desmornes had those daughters when he could have married their respective mothers, as much during their pregnancy as after the birth of the child; that Desmornes supported those daughters and that during his illness they were in attendance at his bedside, Pipia, Josefa and sometimes Gedú; that Desmornes always considered them as his daughters and they always treated him as their father: That he is acquainted with Desmornes since the Cholera Plague and he also knew Desmornes' mother, whose name was Lidia Banker, and that Desmornes' daughters were what in English are "bastards."

Deposition of Floriano Rivera.

This witness after having been duly sworn, says: That he knows Desmornes eight years hence, as a single man and that he left some children, one called Gedú, Pipía and Josefa and another smaller one he had later, knowing that the latter was a daughter of Desmornes because during Desmornes' illness, when the child went to school she would come in and ask father for the benediction; That Desmornes always treated Pipía as his daughter.

Deposition of Ramon Almestica.

This witness, duly sworn, says: That he is a resident of Vieques, having been born there: He says he was well acquainted with Desmornes who was a single man; that when he died he left as only family a girl called Pipía, although he had three more, the eldest, the one following the eldest and another minor, who lived in Patil-
las that he knows they were daughters of Desmornes because
14 the latter considered them as such and aided them and helped them in all he was able to, Pipía being the one who attended her father most: that he knew the latter's mother but does not recall her name: that Pipía was born in the finca belonging to her father: that deponent went to the baptism and Juan Duval, Desmornes' brother, was God-Father and the God-Mother, the Grand-Mother of the child or the mother of Adolfo Desmornes: That the baptism took place in the year sixty or thereabouts; that Desmornes gave his brother a paper to be taken to the Church where the details of the

child were given: that he heard the paper being read and the paper said that Adolfo Desmornes recognized that child which he had had with that woman: that the child was six months old when it was baptized: that he was present when the paper was delivered to the priest: that the priest read the paper as well as the Assistant and the God-Father, Juan Dubois, who was Don Adolfo's brother: that the paper was read at the Church and at the house and that all he remembers is that the paper said that he recognized said child: that he saw Don Adolfo sign said paper and heard when they read his signature.

Deposition of Josefina Luis.

After having duly sworn, she says: That she is and has been a resident of Vieques Island for over forty years, since which date she knows Adolfo Desmornes: she knows he had four daughters, named, Pipía, Josefina, Gedú, and another smaller one: that deponent used to give money to Gedú's mother upon orders from Desmornes, who considered them as daughters, helping Gedú's mother, with barrels of flour paid for by Desmornes: that Desmornes never hided the fact that they were his daughters: that he also paid for the other daughters: Pipía, Josefo and the smallest always being at Desmornes' house: that Pipía was called from San Juan to assist Desmornes, which she did with affection constantly: that Desmornes never married and always considered as his daughters the above named, up to the moment of his death: that Desmornes did not want to testate because he said he had no other family but those four daughters.

Deposition of Maria Gomez.

After being duly sworn she says: That she is and has been a resident of Vieques Island for 40 years or thereabouts: that she knows that Desmornes left four daughters, Isabel, Josefa, the little one called the "madama" and another called Gedú: the- she knows they are daughters of Desmornes because she knows Desmornes and has had intimate friendship with him: that Pipía assisted Desmornes in latter's last illness constantly: that all the town knows that those girls were daughters of Desmornes who never denied it: that when these girls were born Desmornes could have married their mothers because he was a free man, the treatment given these girls by Desmornes having been that of a father, which is well known in Vieques.

Deposition of Lucia Melendez.

After having been duly sworn she says: That she is and has been a resident of Vieques Island since she was born: that she knows that Desmornes left four daughters because when she talked to Desmornes the latter spoke of those daughters: that he liked Pipía most: that Desmornes was single when he had those children: that during his

last illness, at first Pipia assisted him and later on Josefa came: that she was sent for: that Desmornes never denied the fact to anybody that they were his daughters, and always said so to the deponent.

Deposition of Modesto Rios Olmo.

After having been duly sworn she says: That he is Justice of the Peace of Vieques Island, during seven years, and knows Adolfo Desmornes, who is a single man: That he knows that he left one or two daughters, because deponent advised him to testate, and the deceased (Desmornes) told him that Pipía, would straighten out his things: that Desmornes considered Pipía as his daughter and that she attended him during his last illness: besides he had a daughter called Josefa, and one afternoon Desmornes complained of the fact that his daughter Josefa should have come to see him and should have departed so soon, leaving him in such a state: that it is public that Desmornes considered them as daughters and that it is also public that he had one or two more daughters.

Deposition of Isabel Desmornes.

After having been duly sworn she says: That she was born in Vieques and her mother is Andrea Alvarez and her father Adolfo Desmornes, from whom she received always the consideration of a daughter born under wedlock and as such she was treated: that she always assisted him during his illness: that she received several letters from her father while in San Juan: that in the year 1903 she agreed with her sister in San Juan, to establish an action of recognition against her father and she delivered said letters for that purpose: that she later went to Vieques and said letters were misplaced, which letters are the same as were delivered unto her attorney Mr. Vías and that the night that her father died she found said letters in his trunk, so said letters had been misplaced since 1903, until the death of her father: that Delfina and the other smaller ones are sisters of deponent, but of different mothers: that she thought of bringing her action based upon the fact that in her baptismal papers, Desmornes recognizes her as his daughter: that she has no instrument of recognition made by her father: but that she has the letters and the people of Vieques all know that Adolfo Desmornes was his father.

Documentary Evidence Introduced by the Plaintiffs.

Letters.

VIEQUES, *December* 29, 1893.

MY DEAR DAUGHTER: I received your letter which was handed to me by a gentleman unknown to me and which letter I reply to: I was compelled to go to the country to take care of my interests

and not for any other reason. Doña Encarnación has only received one letter from you, and the lady to whom she instructed you to deliver the cover, has written her saying that she has not
17 received it, clear this matter up. It was necessary to make Julia leave the room you occupied because of her carelessness with the fire, María is now living in it, she is the maid of Doña Encarnación. The man that takes care of your cow wants to deliver it, I asked him to await your arrival here. As Doña Encarnación thinks she will have to deliver the house shortly, she told me to gather your things which I took to the country, as I did not have where to keep them in the town, except the cot and your things that could break on the cart, as the gobblers and other glass-ware which I gave to Sioni to keep until your arrival. María gave me four chickens, one that has four chicks, a small one and two cocks, which I had to take to the country. Everything here is running bad, the draught continues, I shall see if I can sell the mares and small horses as well as some colts already tamed. When this reaches your hands, the New Year will set in, in which I desire you happiness. Regards to Eloy and you receive a hug and the benediction of your father.

ADOLFO.

VIEQUES, *May 2nd*, 1894.

ESTEEMED DAUGHTER: On account of the draught which this Island is undergoing and my many occupations, I had been unable to reply to your letter of Jan. 15. When you receive the present, I hope you are enjoying good health. I am obliged to call your attention to your conduct towards Doña Encarnación, you owe this lady all class of considerations, and still you have not written her, write her soon and explain the matter of the cover. When you reply, please tell me if you are coming or not, do not forget the cow and calf you left with that man and the bill you owe Ramona. As to the mares and colts, it is impossible to give prices, as it is matter that has to be attended to and seen by the purchaser himself, so that he may have an idea of what he is buying and the value of same. Regards to Eloy and receive the consideration and hugs of your father who wishes you good health and prosperity.

ADOLFO.

VIEQUES, *November 2nd*, 1896.

ESTEEMED DAUGHTER: I received by the hands of Mr.
18 Cripin your letter of October 21st, and have noted its contents. I am glad you are enjoying good health. As regards the house you mention, it would be better for you to come to Vieques, so that you can see things for yourself. I am now ill with fever, and for the moment cannot attend to business. Your presence will shorten things and it will thus be better. Good health and prosperity, your loving father.

A. DESMORNES.

VIEQUES, *March 28th*, 1898.

Señora Doña Isabel Desmornes, Porto Rico.

MY DEAR DAUGHTER: The only letter I have received from you is that which is dated the 13th instant and was delivered to me on the 28th, that is to say, 14 days after it had been written. The one you say was written under date of February 16 last, was not received nor was the peso mentioned therein, but as Clementina told me that Gedú had given her some money, or $1 and a novenary, I believe it is this. An entanglement is on. Montanes has neither the letter nor the money. The leather is not useful for the mounting-chair, because it is too small and if I had known that you were not going to send it of the size required, I would not have ordered it of you, I shall now have to see if I can sell it. Clementina told me to tell you that she has $2.12 in her possession for you but that the price of the charcoal has gone up to fifty cents a barrel and that she awaits your answer *n*efore buying it. I drop cutting for later on, because I see that everything proceeding from Porto Rico creates many difficulties. I close desiring you good health. I am all right. Your Father.

ADOLFO.

VIEQUES, *December* 16, 1898.

ESTEEMED PIPÍA: I have received your letter dated the 31st of October last to which I reply. I can send you nothing now, because I have no resources, everything here the same, there is no sale for cattle and hence the cattlemen are hard up. I communicated your instructions to the God-Mother, and she told me that she 19 had written you several times, and had received none of yours. I have no time to write at length. I desire you good health. Your father—

ADOLFO.

I do not advice you to come to Vieques now *becomes* things are in bad shape.

VIEQUES, *January* 15, 1900.

Señora Doña Isabel Desmornes.

ESTEEMED DAUGHTER: I have delivered unto the Captain of the sloop "Carmen" Don Pablo Sane, the sum of thirty pesos, which you asked of me in your last letter. When the above mentioned Captain returns to Vieques, write me, acknowledging receipt of the money. I inform you that there are no houses for rent here, I have been compelled to live in somebody else's house, so it is useless to bring Avelina here. Should you intend coming to Vieques leave her in the Capital. Things are turning to the worst here. I desire you good health, I am better Thanks God. Without anything further. Your Father.

ADOLFO.

VIEQUES, *September 3rd*, 1900.

ESTEEMED PIPÍA: I have your letter of August 21st ulto. which letter advises me of your late illness. I am glad you have recovered. I am all right Thanks God. I saw Rafaelito, he is all right, residing at the house of his God-Mother Doña Manita Monell. Relative to the question you make as to the houses in Vieques I shall say that the same happens here as over there, life is unenduring and the country has no resources, that anybody may come here to make a living. Without anything further and with regards to Avelina. When I finished this letter I found out that Luisa had a letter from you for me. I advise you that I have to earn my living in the country and with hard-ships and that I have no time to maintain correspondence. Your father.

ADOLFO.

At last Luisa delivered to me your letter of August 28th ulto. Everything that happens to you to-day, is due to the manner in which you have acted. I shall try to sell some animals to send you something.

20 VIEQUES, *September 14th*, 1900.

ESTEEMED PIPÍA: I have your letter of the 5th instant and take note of its contents. I am surprised at your unexpected trip to Santo Domingo and how little you think about things. Since the change of money, nobody buys cattle and if it is purchased at all, it is at a low price. The country has slight resources and the "dogs are not tied with sausages" here; wait to see if the things turn to the better. I am surprised that in all the Capital of Porto Rico you should fail to find something to do; at another time you were so anxious to go there. As soon as there is any opportunity I shall let you know. Regards for all. Your father.

ADOLFO.

VIEQUES, *November 12th*, 1900.

ESTEEMED DAUGHTER: I have received your letter dated the 29th of October ulto. as well as the previous ones, which I have already answered and I am surprised to hear you have not received my previous letters—I can not send you anything now, because I have nothing, there is no sale of cattle. Inasmuch as you have received such good information regarding Vieques you can decide as you may see fit, but I caution you not to see those advantages they have made you believe. As regards Rafaelito I have not bothered about the matter because I do not wish to meddle with things or about things that can bring me serious trouble. I request you again not to write me so often as I have to hustle for a life and have no time for correspondence. When I sell cattle I shall advise you. Love for all. Pray God for Health for all. Your father.

ADOLFO.

P. S.—As your last letter has been misplaced I had forgotten to take note of the street and the number of the house in which you live; write it on a piece of paper and deliver it to Captain Heraclio.

VIEQUES, *February 22nd*, 1901.

ESTEEMED DAUGHTER: I received your letter dated the 2nd, instant and have noted its contents. Knoweth that the things everywhere are getting worse and that the Country is in bad shape
21 on account of lack of money, nobody buys animals and everything is paralyzed. I want to sell and cannot find a purchaser: as soon as I sell I shall remedy you. Desiring your good health in the company of your daughter I am always, Your Father.

ADOLFO.

VIEQUES, *March 23rd*, 1901.

ESTEEMED DAUGHTER: I received your letter under date of the 10th instant the contents of which I have noticed. I am informed with pleasure that you are enjoying good health; so far the things here run the same. The cattle has no value because there are no purchasers and the times have now passed by when I did not need to sacrifice myself that I obtained everything without sacrifices or troubles, but now I have to sacrifice myself indeed to make a living. I have written you several times and as soon as I am able to do anything I will let you know, so be patient, until that date arrives. Without nothing further, I desire you health.

ADOLFO.

VIEQUES, *April 28th*, 1901.

ESTEEMED DAUGHTER: It seems impossible that you should think that "blood can be obtained from stones," as I have told you on different occasions the situation which we are encountering here: there is no sale of cattle, but particularly no sale for cows. Two French Sloops that moored on the Island only bought bulls or oxen of large Porto Rican type, so that we find ourselves without resources of any kind, and you continue thinking that the "dogs can be tied with sausages," continue asking and asking your father to send you money. This is making me tired to have to repeat to you the same thing over and over again. For God's sake wait till I can sell and then I shall let you know immediately. Your father desires you good health in company with your child.

ADOLFO.

VIEQUES, *August 23rd*, 1901.

ESTEEMED DAUGHTER: I received your letter, dated the fifteenth instant. I congratulate you for the good trip you made and desire that you continue enjoying good health. I am all right
22 Thanks God. Do not forget to find out the price of the black cloth, the collar and what a thousand feet of pitch-pine lumber is worth; also one thousand feet pine boards and the galvanized iron per 100 lbs. English—two shields; as the American iron has only one shield and is useless. Good-bye preserve yourselves in good health. Your father.

ADOLFO.

VIEQUES, *August* 31*st*, 1901.

ESTEEMED DAUGHTER: I received your letter under date of the 28th instant and sincerely hope you are all in good health; I also received the samples of black cloth, which is too rough; as to "merino," I do not need any: I am informed of the price of the pich-pine, boards and galvanized iron, as well as the price of the collar. The question of taming old colts is a question of time, as they not all are of the same age. Herewith you will find four pesos in bills (—Bank—) for the cutting apparatus, try and get it large, of many gallons, regularly they are of 60 more or less. Regards for all and that they enjoy good health is my wish. I am all right Thanks God. Your father.

ADOLFO.

VIEQUES, *January* 14, 1904.

Señora Doña Josefa Desmornes, in Patillas:

ESTEEMED DAUGHTER: I am replying to your esteemed favor of the 28th of December, 1903, and desire you a prosperous New Year, as well as to María, Angela and the rest of the family and I desire them to continue in good health. I was somewhat sick with a cold and fever, but I am getting over it. If things change a little I will send you a present, but at this time I cannot do so. Regards for all. Your father.

ADOLFO.

VIEQUES, *February* 16, 1904.

Señora Doña Josefa Desmornes, in Patillas:

ESTEEMED DAUGHTER: By your letter addressed to Rosa Martinez, I have informed myself as to the situation in which you all are: Fortunately I have been able to sell in these days to a Cuban several animals at a bad figure. I am forwith sending you a draft of 25 dollars to remedy your situation somewhat. Regards for all. Your father.

ADOLFO.

Parochial An-otations.

23 The Reverend Don Antonio Antonini, Rector of the Parochial Church of the Holy Conception of the Island of Vieques, Bishopric of Porto Rico, certify: That on book 3 of baptisms, at folio 68 over and under number 163 there is the following an-otation: "In this Parochy of the Immaculate Conception, and Aposthol Santiago of Isabel Segunda of Vieques, Bishopric of Porto Rico, on the fourteenth day of October in the year eighteen sixty five, I, the Rev. Don Antonio Bernazar, Rector of the said Parish, solemnly baptized and put the name of Isabel, to a child, (girl), born on the 29th of November last, natural daughter of Adolfo Desmornes and of Andrea Alvarez, their God-Father being Juan Pantalier

and Lidia Bange, to whom I called attention to the spiritual relationship and of their obligations, to which I certify.

ANTONIO BERNAZAR.

It is a true copy of its original to which I refer and on petition of a legitimate party I issue the present, which I seal and sign with that of this Parish.

Vieques, April 1st, eighteen hundred and ninety-two.

ANTONIO ANTONINI.

The Reverend Antonio Antoniny, Rector of the Parochial Church of the Holy Conception of the Island of Vieques, Bishopric of Porto Rico certifies: That in book 5 of baptisms, at folio 269 over under number 1365 there is the following an-otation: "In this Parish of the Immaculate Conception, and Aposthol Santiago of the Island of Vieques, Bishopric of Porto Rico, on the third day of the month of October, eighteen hundred and eighty five, I, the Reverend Don Vicente Llover, Rector of the same, solemnly baptized with the rites of the Church and named Manuel Nasario a boy born on the 28th day of July last, natural son of Delfina Desmornes of this vicinity, and neighborhood: Paternal Relatives, Adolfo Desmornes and Ana Rebecca Cristian, God-Fathers Teodore Regus and Pascuala Huertas to whom I called attention to the spiritual relationship and other obligations of which I certify.

VICENTE LLOVER.

This copy is an exact transcript of its original on file and on petition of an interested party, I issue the present and sign
24 and seal the same at Vieques, this third day of November, 1905.

ANTONIO ANTONINI.

The Reverend Don Antonio Antonini, Rector of the Parochial Church of the Holy Conception of the Island of Vieques, Bishopric of Porto Rico, certifies: That in book 2 of baptisms, at folio 242, under number 769, there is the following annotation: "In this Parish of the Immaculate Conception and Aposthol Santiago of Isabel Segunda of Vieques, Bishopric of Porto Rico, on the 16th day of the month (not stated) in the year eighteen hundred and sixty four, I, the Reverend Antonio Bennazar, Rector of the same, solemnly baptized, with the rites of the Church and named Felix, a boy born on the 18th of October, natural son of Adolfo Desmornes and Andrea Alvarez, their God-Fathers being Juan Pantalier and Lidia Bange, to whom I called attention to the spiritual relationship and other obligations, to which I certify.

ANTONIO BENNASAR.

Copy the original of which is on file and to which I refer and on petition of interested party I issue the present and sign and seal the same at Vieques on the 10th of June, nineteen hundred and six.

ANTONIO ANTONINI.

Legal Grounds of the Appeal.

It is considered that the judgment appealed from, openly infringes a principle of law recognized by all Legislations as to the retroactive effect of the laws, which principle has been laid down in Article 3 of the present Civil Code and in the transitory dispositions of the same.

It is certain that the Civil Code of 1890 determined that the action for the recognition of filiation could only be exercised during the life of the presumptive father, but this disposition of the new Law, could not deprive the children born under the provisions of the previous law of their right to claim their recognition as natural children, for the simple reason that their father had died prior to the enforcement of the Civil Code, which went into effect on the mentioned year 1890, and for the same reason when this Code was reformed, establishing that the action only lasts until the child is two years older than of legal age, even then, unless committing a great injustice, it could not deprive the children born prior to the enforcement of the Civil Code of exercising their action, simply because of the fact that when the Code was reformed, their age exceeded the one fixed for the extinction of said right.

II.

The law is also considered to have been infringed in that the judgement appealed from tends to give a legal obligatory force to the bases which were taken into account for the preparation of the Civil Code of 1889, when said bases, only constitute certain recommendations to the Spanish Code Commission which prepared the proposed Civil Code, which proposed Code, upon discussion, could or could not have been enacted by both Legislative Bodies.

III.

The same principle that a repealed Statute remains as if it had never been in force which has been endeavored to apply in the judgment in question, has been wrongly interpreted, inasmuch as constant decisions hold, that the repealing of a Statute, leaves unaltered all civil rights of the parties, which were acquired under the repealed Statute.

It is considered that it is not good doctrine to state the law that shall apply as it should be determined by the date on which the recognition took place, and not by the birth of the child, as, if the recognition has been effected, it cannot be logically affirmed, that because of this fact, an action lies to obtain the same recognition.

IV.

That judgment also infringes Law 11 of Toro, or, Law 1, Titie 5, Book 10 of the New Compilation, forasmuch as this law establishes that the action for recognition can be exercised at any time

during the life of the father or after his death, and the con-
26 stant decisions of the Courts which accept as good, not only express recognitions, but also tacit. (Opinions of October 8, 1853, January 5th and April 20th, 1871, March 23, 1892, January 14, 1873, March 18th, same year, March 12th, 1874, October 14, 1875, December 27, 1876, May 21, 1887, June 12, 1885, July 10, 1886, November 10th, same year, July 9, 1896, and many others.)

V.

It is also considered that there has been error on the part of the Court in considering the evidence presented at the hearing, inasmuch as of the joint study of the evidence and proofs it is completely apparent that decedent Adolfo Desmornes, by direct acts of his own, done since the birth of Isabel Desmornes, since the year 1865 and always thereafter, if not in an express manner at least indirectly, just as was consented by the laws then in force—which said proofs, posterior to the enforcement of the Code, being corroborate proofs, should have been taken into consideration by the Court on rendering its judgment in the present case.

VI.

The appellants reserve the right to extend the grounds of their appeal at the hearing, adding any other legal considerations tending to justify that the judgement rendered is contrary to law and to the evidence and proofs submitted.

Humacao, September 14, 1906.

JUAN F. VIAS,
Attorney for Plaintiffs.

Received a true copy of this statement to the end that I may propose the amendments thereto considered pertinent, this Seventeenth day of September, nineteen hundrd and six.

HENRY F. HORD,
Attorney for the Appellee.

The foregoing is hereby approved being a statement of facts in this case. Signed in my office at Humacao, this 14th day of November, 1906.

CHARLES E. FOOTE,
Judge District Court of Humacao.

I, Enrique Rincon Plumey, Secretary of the District Court in and for the Judicial District of Humacao, do hereby cer-
27 tify: That the foregoing is a correct copy of the statement of facts approved, filed with the record of the case, the title of which is set forth at the beginning hereof; and on petition of Attorney Vías Ochoteco, for the appeal taken, I issue the foregoing under my signature and the seal of the Court of Humacao on the first day of December, 1906.

[SEAL OF THE COURT.]

ENRIQUE RINCON,
Secretary of the District Court.

In the District Court for the Judicial District of Humacao.

JOSEFA É ISABEL DESMORNES
vs.
THE UNKNOWN HEIRS OF ADOLFO DESMORNES.

Recognition of Filiation.

Opinion.

This is an action brought by Josefa é Isabel Desmornes against The Unknown Heirs of Adolfo Desmornes, praying to be declared natural or illegitimate daughters of the decedent Adolfo Desmornes y Banga, in which action by order of this Court notices were published for a term of sixty days calling those who considered themselves with right, during which time Augusto Burnet, a nephew of decedent, appeared and answered the Complaint. On petition of both parties, the Court set the hearing of the case for June 29, 1905, at which hearing, Attorney J. F. Vías appeared on behalf of the plaintiffs, The Prosecuting Attorney for the People of Porto Rico and Attorney W. H. Hawkins for the defendant. The Court after receiving the documentary proofs, the evidence and hearing the Attorneys of both parties, reserved its decision.

The evidence in this case furnished by the plaintiffs is of acts done by Adolfo Desmornes at divers times, and during a period commencing with the year 1865 and ending in 1905. According to Law 11 of Toro, or Law 1, Title 5, Book 10 of the New Compilation,
28 the action for recognition can be exercised at any time during the life or after the death of the father; and according to the Civil Code of 1889 which repealed the Toro Laws, this action can only be exercised during the life of the presumptive father; and under the present Civil Code the action can be brought two years after becoming of age.

The death of Adolfo Desmornes, presumptive father of the plaintiffs, occurred in the month of November, 1905, prior to the commencement of this action and as the proofs show that plaintiffs reached their majority more than two years before the present Code took effect, the action has prescribed by both Laws. The plaintiffs do not aver that the provisions of the previous or present Civil Code should apply, but sustain that the law on which judgment should be based is Law 11 of Toro; that the recognition of children prior to the enactment of the Civil Code of 1889 is governed by the provisions of the previous law and that if the anterior or present Civil Code are applied it would violate an accrued right and they refer to a decision of the Supreme Court of Spain of July 9, 1896, which says:

"According to rule fourth of the transitory provisions of this Code, the actions and rights originating prior to the publication hereof, should exist to such extent and under such terms as they were recognized under the previous law.

"Therefore, the right of a minor to be recognized as a natural child, in the former case, should be governed by Law 11 of Toro, or, Law 1, Title 10, New Compilation and not by Articles 131, 133 and 135 of this Code."

And Rule Fourth of the provisions relative to the publication of the Code of 1889, says:

"The juridic relations arising out of marriage, as to the persons and properties of the spouses and of their descendants, paternity and filiation, patria potestas of husband and wife over their minor children, civil effects of contracts, and generally, all that constitutes the right of family, shall be determined in accordance with the essential principles on which the present legal status is based, except as to provisions of Rules 17, 18, 22 and 23."

The decision of the Supreme Court of Spain of July 9, 29 1896 and Rule Fourth hereinabove quoted, do nothing further than sustain a principle of law recognized of time immemorial by every civilized nation, namely, that a repealed Statute remains as if it had never been in force, except as to transactions which have taken place and have been done prior to the repealing thereof, but the act of repealing the Statute leaves the civil rights of the parties acquired thereunder, unaltered.

It is not the date of the birth of the child that determines the law that shall apply to the action for recognition, but the date on which the recognition took place: the right accrues in the latter case and not in the former.

The Court is of the opinion that the proofs of acts done by Adolfo Desmornes on the dates hereinabove mentioned is the last the Court can consider in rendering judgement. Wherfore the Court orders that judgement be entered in favor of defendants.

Humacao, P. R., August 20, 1906.

CHARLES E. FOOTE,
Judge of the District Court of Humacao.

I, Enrique Rincon Plumery, Secretary of the District Court in and for the Judicial District of Humacao, do hereby certify: That the foregoing is a true copy from the original thereof on file with the record of this case.

And on petition of Attorney Don Juan F. Vías, for the appeal he has taken I issue the present copy under my signature and the seal of the Court of Humacao, this 30th day of September, 1906.

[Seal of the Court.]

ENRIQUE RINCON,
Secretary of the District Court.

In the District Court in and for the Judicial District of Humacao.

JOSEFA É ISABEL DESMORNES
vs.
THE UNKNOWN HEIRS OF ADOLFO DESMORNES Y BANGE.

30 Recognition of Filiation.

Order.

Whereas, Josefa é Isabel Desmornes y Alvaréz, have brought an action in the District Court of Humacao for recognition of filiation, averring that they are natural or illegitimate daughters of Don Adolfo Desmornes y Banga, resident of the Island of Vieques, who is unmarried and died in the said Island on the 2nd day of November of the past year 1905, without leaving testamentary dispositions in the manner provided by Law; and

Whereas, said petitioners request that notices be published calling those unknown persons who consider that they have a preferential claim to that of the petitioners to contest the proofs of their filiation; and

Whereas, there is no manner of procedure clearly set forth in the Code of Civil Procedure or in any Statute for this class of actions, for which reason the best and most adequate procedure shall be determined in accordance with the law as is established in Section 36 of the Code of Civil Procedure;

Therefore, it is hereby ordered that notices be published comprising a brief of the statements set forth by the plaintiffs in their petition, calling those unknown persons who may have a preferential right to that of petitioners to contest the proofs of their filiation within sixty days, which said sixty days, shall count from the date on which the first notice is published in the "Boletin Mercantil of Porto Rico"; provided, furthermore, that the publication thereof shall be made once a week for sixty days, and that attention shall be called therein to the fact that after the expiration of said term, a day will be set for the hearing of the proofs and the petition will be acted upon, in accordance with Law.

31 Given under my signature in Humacao, this twenty-fourth day of the month of March 1906.

CHARLES E. FOOTE,
Judge of the District Court of Humacao.

I Certify:
ENRIQUE RINCÓN,
Secretary.

I, Enrique Rincon Plumey, Secretary of the District Court in and for the Judicial District of Humacao, do hereby certify: That the foregoing is a true copy of the original on file with the Record of the case hereinabove mentioned, and on petition of Attorney Juan F. Vias, for the appeal he has taken, I issue the present copy under my

signature and the seal of the Court of Humacao, this 30th day of September 1906.

[Seal of the Court.]

ENRIQUE RINCÓN.
Secretary of the District Court.

In the District Court for the Judicial District of Humacao.

JOSEFA É ISABEL DESMORNES Y ALVAREZ
vs.
THE UNKNOWN HEIRS OF ADOLFO DESMORNES.

Action for Recognition of Filiation in Favor of Plaintiffs.

Josefa e Isabel Desmornes, of age, the first married and resident of Patillas, and the other single and resident of San Juan appear before this Honorable Court, through their Attorney Juan F. Vías Ochoteco, praying that citations issue through the publication of notices in the above entitled cause, and thereupon say:

I.

That petitioners are the plaintiffs in the above cause and their complaint was duly filed in the office of the Secretary of this Court.

II.

That your petitioners in this action have taken incessant pains to ascertain if any person exists within or without the Island, who could have a right to object to the complaint filed by your
32 petitioners, and from these researches, it appears from information given by those persons who were decedent Adolfo Desmornes' greatest friends, that no person is known who could legally make a claim against the allegations of your petitioners.

III.

That those persons who have furnished such information are Don Guillermo Carreras and Don Antonio Torres Barba, who were intimate friends of decedent Adolfo Desmornes, and who were acquainted with his family ties.

IV.

And inasmuch as Mr. Desmornes might have lived some time out of the Island, it becomes necessary to publish notices to the end that those persons who consider themselves with right to object to the petition of the plaintiffs, may do so, although the plaintiffs aver, that no person will appear, because they are the only interested parties to the action.

Wherefore, your petition-rs through their Attorney, beg leave — ask this Court to call those unknown persons who may have a right of action or claim in the above entitled cause to appear within the legal time that this Court may fix in the notices hereby prayed for.

Humacao, March 20th, 1906.

JUAN F. VIAS,
Attorney for the Petitioners.

I, Juan F. Vias Ochoteco, Attorney for Isabel and Josefa Desmornes do solemnly under oath say: That the facts hereinabove set forth are the truth and nothing but the truth, and that the same are known to me by information, and I sign this oath because the aforementioned Isabel y Josefa Desmornes, do not reside within this Judicial District, being residents of Patillas and San Juan respectively.

Humacao, March 20th, 1906.

JUAN F. VIAS.

Subscribed and sworn to before me this 20th day of March, 1906.

ENRIQUE RINCON,
Secretary of the District Court.

33 I, Enrique Rincon Plumey, Secretary of the District Court in and for the Judicial District of Humacao, do hereby certify: That the foregoing is a correct copy of the original on file with the Record in the above entitled case; and on petition of Attorney Juan F. Vias, for the appeal he has taken, I issue the foregoing under my signature and the seal of the Court of Humacao, this 30th, day of September, 1906.

[Seal of the Court.]

ENRIQUE RINCON,
Secretary of the District Court.

In the District Court of Humacao.

JOSEFA É ISABEL DESMORNES Y ALVARÈZ, Plaintiffs,
vs.
THE UNKNOWN HEIRS OF ADOLPHE DESMORNES et al., Defendants.

Action for Recognition of Filiation in Favor of Plaintiffs.

Answer or Claim of Auguste Burnet to the Petition for Declaration of Heirship of Josefa e Isabel Desmornes y Alvarez.

Auguste Burnet, by his attorneys Henry F. Hord and William H. Hawkins, answering the petition of Josefa é Isabel Desmornes y Alvarez, sets forth and alleges:

I.

That Don Adolfo Desmornes y Bange, a citizen of the Republic of France and resident of the Island of Vieques, died in the said Island, on the 2nd day of November, 1905, intestate, and without leaving any wife or legitimate children or recognized natural children. That at the time of his death he was the owner of and possessed of an estate consisting of real and personal property valued at $7745.

II.

That this claimant, A. Burnet, is the only son and heir of Auguste Burnet of St. Thomas, who died in 1869, and who was the
34 only brother of said Adolphe Desmornes, therefore your petitioner is the nephew of the said deceased Adolphe Desmornes y Bange. That although this claimant was thoroughly cognizant of the family affairs and history of the said Adolphe Desmornes y Bange he never has heard of and does not know of any other relatives of the said deceased Adolphe Desmornes y Bange. That although the claimants Josefa é Isabel Desmornes y Alvarez claim to be the recognized natural children of the deceased Adolphe Desmornes y Bange as set forth in their petition presented to this Honorable Court your petitioner denies that they are the natural children of the said Adolphe Desmornes y Bange or that they were ever recognized as such.

Wherefore this claimant and petitioner prays this Honorable Court to be adjudged the sole and only heir of the said Adolphe Desmornes y Bange and as such entitled to inherit all of the estate left by the said deceased Desmornes, and that the claimants Josefa and Isabel Desmornes y Alvarez be adjudged by this Court not to be entitled to the said estate of the said Desmornes or any part thereof.

HENRY F. FORD,
WILLIAM H. HAWKINS,
Attorneys for Claimant Auguste Burnet.

I, Enrique Rincon Plumey, Secretary of the District Court of Humacao, do hereby certify: That the foregoing copy is correct transcript of the original on file with the Record of this case and on petition of Attorney Juan F. Vías Ochoteco, for the appeal he has taken, I issue the present under my signature and the seal of the Court of Humacao, this — of September, 1906.

[Seal of the Court.]

ENRIQUE RINCÓN,
Secretary of the District Court.

35 UNITED STATES OF AMERICA,
District of Porto Rico, ss:

Auguste Burnet being duly sworn deposes and says that he is the claimant named in the foregoing and that he has read the foregoing

answer or claim and knows the contents thereof and that the same is true of his own knowledge.

A. BURNET.

Subscribed and sworn to before me this 10th day of April, 1906

LCDO. JACINTO TEXIDOR,
Notary Public.

I, Enrique Rincon Plumey, Secretary of the District Court of Humacao, do hereby certify: That the foregoing copy is a true copy of the original on file with the Record of this case and on petition of Attorney Juan F. Vias Ochoteco, for the appeal he has taken, I issue the foregoing under my hand and the seal of the Court of Humacao, this — of September, 1906.

—— ——,
Secretary District Court.

In the District Court in and for the Judicial District of Humacao.

JOSEFA É ISABEL DESMORNES Y ALVAREZ
vs.
THE UNKNOWN HEIRS OF ADOLFO DESMORNES.

Action for Recognition of Filiation of Plaintiffs.

Isabel y Josefa Desmornes, of age, the first married and a resident of Patillas and the other single and a resident of San Juan, through their Attorney, Juan F. Vias Cohoteco, appear before this Honorable Court and file this their Complaint against the Unknown Heirs of Don Adolfo Desmornes, for recognition in their favor, of their state of natural recognized or illegitimate children of the said Adolfo Desmornes, and thereupon alleges:

36 I.

That the said Don Adolfo Desmornes y Bange, a resident of the Island of Vieques, died unmarried in said Island of Vieques, on the 2nd day of November of the past year 1905, without leaving any testamentary dispositions as by law provided.

II.

That said Desmornes left no litigitimate descendants or ascendants who could have a preferential claim to inherit from him, but only left two natural or illegitimate children, had in his relations with Andrea Alvarez, which were baptized in the Immaculate Conception and Aposthol Santiago Parish, of the town of Isabel Segunda of said Island, there appearing in the annotation of Isabel's baptism, the recognition of natural daughter made by the decedent Desmornes, her father.

III.

That the above mentioned children are the plaintiffs hereunder, who were always held and considered by decedent Adolfo Desmornes, in life, as his daughters, according them the protection, care and affection that a father always tenders to his daughters.

IV.

That in consequence of these acts done by Desmornes, the plaintiffs hereunder have been considered by nearly all the inhabitants of Vieques Island, as the recognized daughters of said Desmornes, who, socially, never in his life did he conceal himself to say that plaintiffs were his daughters had during his carnal relations with his neighbor Andrea Alvarez.

V.

That the decedent Adolfo Desmornes, From December 29, 1893 until February 16, 1904, addressed several letters to the plaintiffs hereunder, written of his own hand and signed by him, in which can be apparently seen, the paternal affection towards them: calling them my dear daughters and endeavoring to aid them in life as much as he could.

37 VI.

That upon entering of record in the books of the Parish of Vieques, the ceremony of the baptism of plaintiff Isabel Desmornes on the fourteenth day of October 1865, her father Don Adolfo Desmornes presented a statement subscribed and sworn to by him, by which statement he authorized the Parish Priest thereof to consign in the books of the Parish the express recognition he made unto the said Isabel, and said statement written by Desmornes and filed in said Parish, has disappeared or been misplaced, the efforts made to secure this direct proof of recognition having been useless.

VII.

That the plaintiffs hereunder have made incessant efforts to ascertain whether there exists any person having a right or claim in this action, and according to information obtained from parties who were well acquainted with decedent Adolfo Desmornes, such as Dr. Guillermo Carreras and Antonio Torres Barba, a merchant, nobody exists in Porto Rico to oppose the just claim of the plaintiffs.

Wherefore the above mentioned plaintiffs, Isabel y Josefa Desmornes, through their Attorney Juan F. Vias Ochoteco, pray this Honorable Court that judgment be rendered in their favor and against the defendants, by which judgment plaintiffs be adjudged natural recognized or illegitimate daughters of Adolfo Desmornes y Bango, with all the rights granted unto this class of children by law as to the persons and properties of their natural parents, with

imposition of expenses and costs to those who oppose this action.
Humacao, March 20, 1906.

JUAN F. VIAS,
Attorney for the Plaintiffs.

I, Juan F. Vias Ochoteco, Attorney for the Plaintiffs in this action, declare under oath: That the foregoing allegations are true and nothing but the truth, and that he signs this oath be-
38 cause the petitioners are not residents of this Judicial District.
Humacao, March 20th, 1906.

JUAN F. VIAS.

Subscribed and sworn to before me, this 20th day of March, 1906.

ENRIQUE RINCON,
Secretary of the District Court.

I, Enrique Rincon Plumey, Secretary of the District Court in and for the Judicial District of Humacao, do hereby certify. That the foregoing is a correct copy of the original on file with the record of this case, and on petition of Attorney, Juan F. Vias, for the appeal he has taken. I issue the present under my signature and the seal of the Court of Humacao, this 30th day of September, 1906.

ENRIQUE RINCON.
Secretary District Court.

In the District Court in and for the Judicial District of Humacao.

ISABEL Y JOSEFA DESMORNES
vs.
THE UNKNOWN HEIRS OF ADOLFO DESMORNES.

Action for Recognition of Filiation.

Modesta Ramos, minor, represented by her mother Isidora Ramos and Bartola Delfina, through her Attorney Salvador Fulladosa, appear before this Court and allege:

I.

That by notices published in the newspaper "El Boletin Mercantil" they have been informed of the action brought by plaintiffs Isabel y Josefa Desmornes, praying to be declared natural or illegitimate children of Adolfo Desmornes, who died recently in Vieques Island.

II.

That the petitioners hereunder aver that they have the
39 same right *the same right* as the plaintiffs, to be held and considered as natural or illegitimate daughters of Adolfo Des-

mornes, because they always have been considered and held to be daughters of said gentleman.

III.

That in consequence of the foregoing your petitioners consider themselves authorized under and by the law to associate themselves with the plaintiffs in this action and be adjudged also, natural or illegitimate daughters of decedent Adolfo Desmornes.

Wherefore your petitioners pray this Honorable Court to render judgment in this case, declaring Isabel and Josefa Desmornes natural or illegitimate daughters of Adolfo Desmornes together with your petitioners hereunder.

Humacao, May 24, 1906.

SALVADOR FULLADOSA.

I, Enrique Rincon Plumey, Secretary of the District Court in and for the Judicial District of Humacao, do hereby certify: That the foregoing is a correct copy of the original on file with the Record of this case and on petition of Attorney Juan F. Vias for the appeal he has taken, I issue the present under my signature and the seal of the Court of Humacao, this 30th day of September, 1906.

ENRIQUE RINCON.
Secretary District Court.

In the District Court of Humacao.

JOSEFA É ISABEL DESMORNES
vs.
THE UNKNOWN HEIRS OF ADOLFO DESMORNES.

Action for Recognition of Filiation.

Judgment.

40 THE UNITED STATES OF AMERICA,
The President of the U. S., ss:

On the 29th day of June 1906 this case was set for a hearing, the plaintiffs appearing by their Attorney Juan F. Vias, the defendant Augusto Burnet, nephew of decedent Adolfo Desmornes by his Attorney W. H. Hawkins and the People of Porto Rico by the Prosecuting Attorney José R. Aponte, they having been previously summoned therefor: a notice having been published by order of this Court for a term of sixty days, that those who had any right or claim might appear, on which said day the Court, after receiving the documentary proofs furnished and hearing the testimony of witnesses and the Attorneys for both sides, reserved its decision. On this date, August 20th, 1906, the Court is of the opinion that the law and the facts are against the plaintiffs and therefor- dismisses the

complaint, with costs estimated at — to be paid by said plaintiffs, and attachment being levied upon their property to comply with this judgment. Given under my signature at Humacao on the 20th day of August, 1906. Charles E. Foote, I certify—Enrique Rincon, Secretary. Registered on the 20th, of August, 1906. Rincon.

I, Enrique Rincon Plumey, Secretary of the District Court in and for the Judicial District of Humacao, do hereby certify: That the foregoing is a correct copy of the original on file with the Record of this case and on petition of Don Juan F. Vias, Attorney for the Plaintiffs, I issue the foregoing under my signature and the seal of the Court of Humacao, this 30th day of September, 1906.

[SEAL OF THE COURT.]

ENRIQUE RINCON,
Secretary District Court.

In the District Court in and for the Judicial District of Humacao.

JOSEFA É ISABEL DESMORNES
vs.
THE UNKNOWN HEIRS OF ADOLFO DESMORNES.

Filiation.

41 To the Honorable Secretary of the above-entitled Court:

Isabel y Josefa Desmornes, through their Attorney advise you that as they have been informed under date of the eighth instant of the judgement rendered in the above entitled case and as they do not agree with same, they take this their appeal from same, before the Honorable the Supreme Court of Porto Rico.

Humacao, September 15th, 1906.

JUAN F. VIAS,
Attorney for the Plaintiffs.

Filed September 15, 1906.

RINCON.

I, Enrique Rincon Plumey, Secretary of the District Court in and for the Judicial District of Humacao, do hereby certify: That the foregoing is a correct copy of the original on file in the Record of this case and on petition of Mr. Juan F. Vias, Attorney for the Plaintiffs, for the appeal he has taken, I issue this copy under my signature and the seal of the Humacao Court, this 30th day of September, 1906.

[SEAL OF THE COURT.]

ENRIQUE RINCON,
Secretary District Court.

Filed in my office on the 17th day of December, 1906.

———— ————,
Secretary Supreme Court of Porto Rico.

In the Supreme Court of Porto Rico.

JOSEFA É ISABEL DESMORNES Y ALVAREZ, Plaintiffs,
vs.
AUGUSTE BURNET and THE UNKNOWN HEIRS OF ADOLFO DESMORNES Y BANGE, Defendants.

Motion of Appellee Augusto Burnet.

Augusto Burnet, Appellee, represented by his Attorney, William H. Hawkins, begs leave to inform the Honorable Court
42 that notwithstanding the fact that the Record of this Appeal was filed in the office of the Secretary of this Court on December 17, 1906, up to this date the appellants have not presented the Brief required by Rule 54 of this Court, nor have said appellants requested and obtained extension of time therefor.

Wherefore the Appellee prays the Honorable Court to dismiss the appeal in accordance with the provisions of Rule 64 of this Court.

San Juan, P. R., January 2, 1907.

WILLIAM H. HAWKINS,
Attorney for the Appellee.

Filed in my office on this 2nd day of January, 1907.

____ ____,
Secretary of the Supreme Court.

In the Supreme Court of Porto Rico.

JOSEFA É ISABEL DESMORNES
vs.
THE UNKNOWN HEIRS OF ADOLFO DESMORNES BANGE.

Action on Filiation.

Josefa é Isabel Desmornes, appellants hereunder, through their attorney Juan F. Vias Ochoteco, answer the motion for dismissal of appeal presented by the appellee, as follows, to wit:

I.

That it is not true that the appellants have not presented the brief required by the Rules of this Court, because said brief has been included in the statement of facts presented to the Secretary of this Court on December 17, 1906.

II.

That in the above mentioned statement of facts, there have been set forth the legal grounds of the appeal by your petitioners and it would be useless and unnecessary to repeat said grounds,
43 which are known to the Attorney for the Appellee Augusto Burnet, a claimant who has not shown his right so far to

obstruct and bar the action established for recognition of filiation or the state of natural children claimed by your petitioners.

III.

That the statement of facts, including the brief asked for by Augusto Burnet's Attorney, was forwarded to the latter under date of December 17, 1906.

IV.

That even supposing that in cases like this there becomes necessary for the better ends of justice to file a brief as requested by Augusto Burnet's Attorney, this Honorable Court should consider that the parties appealing, have fulfilled the requirements of the Civil Code (Procedure), and that the omission of said brief, would constitute a simple violation of the rules, which could be decided at the discretion of the Court, considering the matters under discussion and the conditions of the interested parties to the case.

V.

Your petitioners believe that said omission cannot be an obstacle for this Honorable Court to decide, according to law, such an important civil question for him, or, namely: to determine if they are or are not daughters of decedent Adolfo Desmornes and whether they were held by him as such, through a tacit recognition, authorized under previous laws.

VI.

That notwithstanding these allegations, your petitioners present a brief, as a part of this petition, which is a true copy of that contained in the statement of facts, so that, if the Court so decides, it be ordered filed in the Office of the Secretary of this Court in accordance with Law.

44 Wherefore your petitioners, respectfully pray unto this Honorable Court to dismiss the motion presented by Augusto Burnet's Attorney, and decide that, in this case, the Brief referred to in the Rules of this Court is unnecessary, or, if this be not pertinent, that the brief hereto attached be filed in equity, so that it may serve its purpose in the appeal.

Humacao for San Juan, January 3rd, 1907.

JUAN F. VIAS,
Attorney for the Appellants.

Filed in my office on this 7th day of January, 1907.

A. F. CASTRO,
Secretary of the Supreme Court.

On this fourteenth day of January the Court being constituted by Messrs. Quiñonez, President and Associate Judges, Hernandez, Figueras and MacLeary the hearing of the previous motion took

place. Attorney Hawkins representing the Appellee and Vias Ochoteco representing the Appellants having been present, said hearing having finished, to which I certify.

A. F. CASTRO.

In the Supreme Court of Porto Rico.

No. 101.

JOSEFA É ISABEL DESMORNES
vs.
THE UNKNOWN HEIRS OF ADOLFO DESMORNES.

Action for Recognition of Filiation.

Appeal from the District Court of Humacao.

Order.

SAN JUAN, PORTO, *January 16th*, 1907.

As the appellants have not complied with the provisions of Article 54 of the Rules of this Court, reference being made to the cases of Agustin Hernandez vs. José Antonio Fleytas; Amalio Pereira vs. Paula Villafaña et al.; Manuel Rosaly Castillo vs. The People of Porto Rico et al.; and Central San Cristobal vs. Carmen Fuertes et al.; in which of its own initiative and on the same ground the appeals were dismissed by this Supreme Court.

45 The motion is hereby sustained and therefore the appeal taken against the judgment rendered on the 20th day of August of the past year by the District Court of Humacao in the above entitled cause, is consequently dismissed, with costs to the appellants. Advise the lower Court hereof.

It was so resolved by the members of the Supreme Court and witnesseth their signatures.

JOSÉ S. QUIÑONEZ.
JOSÉ MA. FIGUERAS.
JOSÉ C. HERNANDEZ.
J. H. M'LEARY.

The District Court of Humacao was advised of the foregoing order on the seventeenth day of January, I certify.

A. F. CASTRO.

Affidavit.

I, Juan F. Vias Ochoteco, duly sworn depose and says:

First. That I am the Attorney for Isabel y Josefa Desmornes in certain action brought before the District Court of Humacao, to obtain the declaration in their favor of natural or illegitimate daughters of Adolfo Desmornes.

Second. That said action ended on account of judgement rendered thereon from which an appeal was taken and a statement of facts filed and approved by the Judge, which statement contained the legal grounds of the appeal.

Third. That deponent did not present the brief referred to in Article 54 of the Rules of the Supreme Court of Porto Rico, because he thought in good faith and it was his belief, that such brief was unnecessary and was not required by the Rules in cases where, together with the Record of the appeal a statement of facts has been presented in which statement are consigned substantially the same requirements of said Rule, or, namely, a brief of the facts and a detail of the legal grounds of the appeal.

Fourth. That a copy of said statement of facts which con-
46 tained the requirements of the law was delivered September 17, 1906, to Augusto Burnet's Attorney in the above case, notwithstanding the fact that said Augusto Burnet has not proved that he is an interested party in this action.

Fifth. That deponent besides this, even thought he might have had such belief, would have been unable to comply with that requirement because the term expired around Christmas, just when the typewriters and clerks, take a vacation, as do public officials.

And to make it so appear I sign the foregoing in Humacao this 3rd day of January, 1907.

JUAN F. VIAS.

Subscribed and sworn to before me this 3rd day of January, 1907.

ENRIQUE RINCON,
Secretary, District Court.

In the Supreme Court of Porto Rico.

ISABEL Y JOSEFA DESMORNES
vs.
THE UNKNOWN HEIRS OF ADOLFO DESMORNES et al.

Action for Recognition of Filiation.

Brief.

Isabel y Josefa Desmornes, through their Attorney Juan F. Vias Ochoteco, before the Honorable Supreme Court presents this Brief, as follows:

Statement of Facts.

The case above referred to began with a complaint filed by Isabel y Josefa Desmornes, against the unknown heirs of Adolfo Desmornes, to obtain from the Court a sentence by which the plaintiffs should be declared natural daughters, recognized or illegitimate, of Adolfo Desmornes.

47 When the decree or notice was published calling those persons (unknown) who considered themselves with right to object to the claims of the plaintiffs, Mr. Augusto Burnet came forth and answered the complaint, through his Attorneys Hawkins and Hord.

This case was set for hearing on the 29th day of June of this year, in regular order: the case was heard, proofs were taken and the reports of the parties were heard, the Prosecuting Attorney taking part on behalf of The People of Porto Rico. The Court reserved its decision.

On the 20th of August, the Court rendered its judgment declaring that the law and the facts were against the plaintiffs and based said decision, as can be seen in the copy attached to this Record, principally, upon the fact that the recognition had not taken place prior to the enforcement of the Civil Code of Porto Rico, either expressly or tacitly.

The defendants introduced no evidence during the trial.

The Attorney for the plaintiffs as soon as he was informed of the judgement, appealed therefrom to the Honorable Supreme Court of Porto Rico, in a petition addressed to the Secretary of the District Court of Humacao, under date of Sept. 15, 1906, and Augusto Burnet's Attorney was thereupon advised under date of September 17, 1906, a copy of said petition having been forwarded to him for his information.

Isabel y Josefa Desmornes, through their Attorney, under date of September 14, 1906, prepared a statement of facts copy of which was delivered to the Attorney for the Defendants on the 17th of the same month.

No amendments were offered thereto and the Court approved the same on November 14, 1906.

Legal Grounds of Appeal.

48 It is considered that the judgement appealed from openly infringes a principle of law recognized by all Legislations as to the retroactive effect of the laws, which principle has been laid down in Article 3 of the present Civil Code and in the transitory dispositions of the same.

It is certain that the Civil Code of 1890 determined that the action for the recognition of filiation could only be exercised during the life of the presumptive father, but this disposition of the new Law, could not deprive the children born under the provisions of the previous law of their right to claim their recognition as natural children, for the simple reason that their father had died prior to the enforcement of the Civil Code, which went into effect on the above mentioned year 1890, and for the same reason when this Code was reformed, establishing that the action only lasts until the child is two years old that of legal age, even then, unless commit-ing a great injustice, it could not deprive the children born prior to the enforcement of the Civil Code of exercising their action simply because of the fact that when the Code was reformed, their age exceeded the one fixed for the extinction of said right.

II.

The law is also considered to have been infringed in that the judgment appealed from tends to give a legal obligatory force to the bases which were taken into account for the preparation of the Civil Code of 1889, when said bases, only constitute certain recommendations to the Spanish Code Commission which prepared the proposed Civil Code, which proposed Code, upon discussion, could or could not have been enacted by both Legislative Bodies.

III.

The same principle that a repealed Statute remains as if it had never been in free which has been endeavored to apply in the judgment in question, has been wrongly interpreted, inasmuch as constant decisions hold, that the repealing of a Statute, leaves
49 unaltered all civil rights of the parties, which were acquired under the repealed Statute.

It is considered that it is not good doctrine to state the law that shall apply as it should be determined by the date on which the recognition took place, and not by the birth of the child, as, if the recognition has been effected, it cannot be logically affirmed, that because of this fact, an action lies to obtain the same recognition.

IV.

That judgment also infringes Law 11 of Toro, or, Law 1, Title 5, Book 10 of the New Compilation, forasmuch as this law establishes that the action for the recognition can be exercised at any time during the life of the father or after his death, and the constant decisions of the Courts which accept as good, not only express recognitions, but also tacit. (Opinions of October 8, 1853, January 5th and April 20th, 1871, March 23, 1882, January 14, 1873, March 18th, same year, March 12th, 1874, October 14, 1875, December 27, 1876, May 21, 1887, June 12, 1885, July 10, 1886, November 10th, same year, July 9, 1896 and many others.)

V.

It is also considered that there has been error on the part of the Court in considering the evidence presented at the hearing, inasmuch as of the joint study of the evidence and proofs it is completely apparent the decedent Adolfo Desmornes, by direct acts of his own, done since the birth of Isabel Desmornes, since the year 1865 and always thereafter, if not in an express manner at least indirectly, just as was consented by the laws then in force—which said proofs, posterior to the enforcement of the Code, being corroborate proofs, should have been considered by the Court on rendering its judgment in the present case.

VI.

The appellants reserve the right to extend the grounds of their

appeal at the hearing, adding any other legal considerations
50 tending to justify that the judgment rendered is contrary to law and to the evidence and proofs submitted.

Humacao, January 3rd, 1907.

JUAN F. VIAS.

Filed in my office this 7th day of January, 1907.

____ ____,
Secretary of the Supreme Court of Porto Rico.

In the Supreme Court of Porto Rico.

ISABEL Y JOSEFA DESMORNES, Appellants and Plaintiffs,
vs.
THE UNKNOWN HEIRS OF ADOLFO DESMORNES, Appellees and Defendants.

Action on Filiation.

To the Secretary of the Supreme Court and the Attorney for A. Burnet, San Juan:

You are hereby informed that on February 4th, or any other day of this month the Court may designate, a motion presented by the Appellants will be heard, copy of which will be forwarded to you in accordance with law, praying that the order of the dismissal of this appeal issued by this Honorable Court be revoked.

San Juan, January 24th, 1907.

JUAN VIAS OCHOTECO,
CAYETANO COLL Y CUCHI,
Attorneys for the Appellants.

Cayentano Coll y Cuchí deposes and says:

That he has mailed copy of the foregoing to W. H. Hawkins, Attorney for A. Burnet.

CAYETANO COLL Y CUCHI,
Attorney for the Appellants.

51 Subscribed and sworn to before me this 24th day of January, 1907.

[SEAL.] DAMIAN MONTSERRAT,
Notary Public.

Filed in my office on the 25th day of January, 1907.

____ ____,
Secretary of the Supreme Court.

In the Supreme Court of Porto Rico.

ISABEL DESMORNES et al., Appellants and Plaintiffs,
vs.
THE UNKNOWN HEIRS OF APPELLEES AND DEFENDANTS.

Don Cayetano Coll y Cuchi, Attorney for Isabel Desmornes and Josefa Desmornes, respectfully appears before this Honorable Supreme Court, and says:

That this Honorable Supreme Court on motion of the Attorney for A. Burnet has dismissed the appeal interposed in this cause, for an infraction of rules, supposed to have been committed by the appellants; that said order affects the interest of the parties to a great extent and that in view of the affidavits herewith attached and made a part of this motion, appellants pray this court that the order be revoked, and that the lower Court be informed to suspend the enforcement of the judgment and that a day be set for the hearing hereof.

CAYETANO COLL Y CUCHI,
Attorney for the Appellants.

Filed in my office on the 1st day of February, 1907.

_____,
Secretary of the Supreme Court.

Affidavit.

52 Demetrio Carmona, duly sworn says:

That he is a resident of Humacao, of legal age, and is Attorney Juan F. Vias' Clerk; that from December 17, 1906 up to the 24th of the same month he made efforts, in the office of the Secretary of the District Court of Humacao, to secure a copy of the statement of facts approved by that Court, in the case of Isabel y Josefa Desmornes vs. The unknown Heirs of Adolfo Desmornes; that he did this because he wanted his employer to prepare a brief to present the same to the Supreme Court of Porto Rico; that he obtained the document referred to above on the 24th of that month and thereupon went to Juncos to see his family as it was Christmas, the deponent not being able to leave someone in his stead because there is no other competent Typewriter in this City; that on January 2nd he was called by Mr. Vias and they immediately went to work preparing the brief that had to be filed in the Supreme Court in this cause; that on January 3rd notice was received from Attorney Hawkins through the mail enclosing a motion praying for the dismissal of the case, which motion was to be heard in the Supreme Court; that on the date above mentioned the brief was sent to Attorney Jacinto Texidor to be presented to the Court, together with an answer to the motion of dismissal.

Humacao, January 31, 1907.

DEMETRIO CARMONA.

Subscribed and sworn to before me, by Demetrio Carmona, who is personally known to me, this 31st day of January, 1907.

ULPIANO VALDÉS,
Notary Public.

Affidavit.

Enrique Rincon Plumey, of legal age, under oath, says:

That he is Secretary of the District Court for the Judicial District of Humacao; that on December 24, 1906, he delivered
53 to Demetrio Carmona, Clerk of Attorney Juan F. Vias Ochoteco, a certified copy of *of* the statement of facts, in the case of Isabel y Josefa Desmornes vs. The unknown heirs of Adolfo Desmornes, which statement was duly approved by the Court; that he was unable to prepare said copy heretofore, on account of the fact that he was too busy with Court matters and that Attorney Vias has never shown negligence or a desire to abandon the cause of Josefa é Isabel Desmornes.

ENRIQUE RINCÓN.

Subscribed and sworn by Enrique Ricón Plumey, Secretary of the District Court of this Judicial District, this 31st day of January, nineteen hundred and six.

Before me:

LUIS DE THOMAS,
Acting Secretary Municipal Court.

Affidavit.

I, Jacinto Texidor, of legal age, Attorney, duly depose and say:

That on the fourth day of January, 1907, I received a letter addressed to me by Juan F. Vías Ochoteco, which letter contained the brief in the case of Isabel Desmornes et al., and which I received in the afternoon of said day because there was postage due on same.

That in said letter Mr. Vias Ochoteco, besides enclosing the brief, asked me to appear before the Supreme Court on the 7th. day of January, to pray that said brief be admitted.

That as it was late that afternoon to present the said brief to the Court, and it being impossible for me to present it on the 5th which was Saturday, and bearing in mind that Mr. Vías' instructions said that I should appear before the Court to ask that said brief be admitted, I took the same to the Court the first day I could, which was Monday, January 7th, 1907, when I could make no motion orally to the Court because it was not sitting on that day.

That together with said letter of the fourth hereinbefore
54 mentioned, a motion for dismissal was enclosed, made by Attorney Hawkins.

And that Mr. Vias Ochoteco, went to the hearing of said motion himself.

San Juan, P. R., February 1, 1907.

J. TEXIDOR.

Subscribed and sworn to before me, this 1st day of February, 1907.

[SEAL.] SALVADOR SUAU CARBONELL,
Notary Public.

In the Supreme Court of Porto Rico.

ISABEL DESMORNES et al., Appellants,
vs.
THE UNKNOWN HEIRS OF, etc., Appellees.

Action on Filiation.

Affidavit.

Cayetano Coll Cuchí deposes and says:

That under date of February 1, I forwarded copies of motion and documents asking for the reconsideration of an order of this Honorable Court to A. Burnet's Attorney, which motion and documents hereinabove referred — were filed in the Office of the Secretary of this Court on the same date.

CAYETANO COLL Y CUCHI,
Attorney for the Petitioners.

Subscribed and sworn to before me this 6th day of February, 1907.

[SEAL.] FRANK ANTONSANTI,
Notary Public.

In the Supreme Court of Porto Rico.

ISABEL DESMORNES et al., Appellants,
vs.
THE UNKNOWN HEIRS, etc., Appellees.

Action on Filiation.

55 Cayetano Coll y Cuchi, Attorney, deposes and says:

That he has carefully studied the Record of this case, which is on file in the Office of the Secretary of this Court and that without further information than that which is contained in said Record, the conclusion can be reached, and deponent hereby concludes that in the judgment of the Court of Humacao there are grave errors of law which necessitate the reversal of said judgment by this Court.

CAYETANO COLL Y CUCHI,
Attorney-at-Law.

Subscribed and sworn to before me this 4th day of February, 1907.

EUGENIO BENITEZ,
Notary Public.

In the Supreme Court of Porto Rico.

ISABEL DESMORNES et al., Appellants,
vs.
THE UNKNOWN HEIRS OF, ETC., Appellees.

Action on Filiation.

Brief to Support the Motion Praying That the Order of Dismissal in This Case be Revoked and That a Day be Set for the Hearing of the Appeal.

Statement of Facts.

The appellants filed their complaint on March 20, 1906, which was acted upon by the District Court of Humacao, which Court, rendered judgment and an appeal was taken therefrom before this Court in due time. The appeal was carefully prepared and extensions were always secured so that the term for its presentation should not expire. When every detail had been covered for the preparation of said appeal, the presentation of the brief required by Rule 54 of this Court, was delayed three or four days, owing to just cause, as can be seen from the affidavits attached to the motion. On January 2nd, the Attorney for A. Burnet, who was permitted to intervene in the case in the lower Court, without proving the
56 capacity of heirship with which he appeared, asked and obtained the dismissal of this appeal on the ground that Rule 54 had not been complied with. The reconsideration of said order is now asked for and that the appeal be reinstated in the Court Calendar.

Legal Grounds.

This motion is pertinent, it being the manner suggested by good rules of procedure to obtain the repeal of the order of dismissal.

The Palmyra, 12 Wheaton. 9.

Story, referring to the reinstatement of an appeal which had been dismissed because of an error in the Record, without having examined the merits thereof, says:

"It should be presumed that Courts have sufficient powers for the administration of justice; and we have no doubt that this Court has the power to reinstate any case."

In the case of Haight vs. Gay, 8 Cal. 300, the Supreme Court of California says:

"If due to an excusable reason the party has been unable to present its appeal, the remedy is a motion to reinstate."

And said right is granted by the Court even in the Case where the appeal has been dismissed in a previous term.

"Said motion should be supported with a sworn statement of the Attorney averring that there are good grounds for the appeal."

Hagar vs. Mead, 25 Cal. 598.

Rule 54 of this Court says:

"Within ten days after the record of the case has been presented to this Court, the Attorney for the Appellant, shall file a printed or typewritten brief in duplicate with this Court, which shall contain a true and brief description of the case, as set forth in the record, as well as the legal grounds on which the appeal is taken, and furthermore, he shall comply with the Civil Procedure Law in force."

Undoubtedly the Supreme Court has the power to promulgate such rule, and there is no ground for argument as to this but only as regards its interpretation.

57 The spirit of construction of our laws regarding defaults, negligence, omissions etc. is very well expressed in Section 140 of the Code of Civil Procedure. And undoubtedly, when the Courts promulgate and interpret their own rules, they should bear in mind the spirit of territorial legislation; if they do not, their rules, instead of regulating the juridic life of the territory would be a menace. Consequently, the only possible interpretation of Rule 54 is that it tends to avoid appeals of bad faith, the object- of which are to embarass and delay the execution of judgment. Nearly every Supreme Court of the United States has a rule similar to that of the Supreme Court of Porto Rico. But in all cases, its enforcement has been avoided if it injures in an irremedial manner the rights of a party.

In looking over the laws of California, a very important fact should be taken into account, viz: That the parties have one year within which to appeal to the Supreme Court from a judgment of a lower Court. Hence, when rules as the one under discussion have not been complied with the dismissal is always ordered, without prejudice, because an appeal can be taken, which generally is done.

The Supreme Court of the United States has expressly declared that the dismissal of an appeal because the Record was not presented to the Supreme Court within the time specified by law is not equivalent to the confirmation of the judgment under appeal.

United States vs. Gomez, 23 How. 325.

This just and sound doctrine of law, would not apply in Porto Rico, as the time within which to appeal is so short that it is impossible for a party to establish a second appeal, when the first one has been dismissed.

The Court in rendering its decision should consider the fact that Mr. Vias Ochoteco, Attorney for the Appellants, has always taken great interest in this action, requesting such extensions as were necessary, and that as he resides in the Island, his brief was

58 sent to San Juan, on the same day he received a copy of the motion praying for the dismissal of the appeal. A case like this has been favorably decided in favor of appellant's interests, as can be seen in Book 3, Page 583 of Estee's Commentaries, and in many cases therein cited.

In California cases similar to this have always been reinstated.

Poupion vs. Mwsis, 68 Cal. 235; In re. Burton, 93 Cal. 613; Hubback vs. Ross, 79 Cal. 564; McGranth vs. Heyde, 71 Cal. 454; Grant vs. De Lamon, 71 Cal. 329; Dorn vs. Baker, 92 Cal. 194.

In this case all requirements have been complied with by the Appellant; and the last requirement, or the presentation of the brief, was only delayed a few hours by reasons unaccounted for. The case is respectfully submitted to the Supreme Court to decide if in justice and in view of the law cited and the affidavits presented, the appellants should be permitted to submit their case to the Court on its own merits or if it will deprive them forever of the right alleged.

Respectfully,

CAY. COLL CUCHI,
Attorney for the Petitioners.

Filed in my office on the 8th day of February, 1907.

____ ____,
Secretary of the Supreme Court of Porto Rico.

On February 11th the Court being duly constituted by the Acting President, Hernandez, and Associate Justices Figueras, MacLeary and Wolfe, the hearing of the previous motion took place; Attorney Fernando Geigel representing the Appellants and William H. Hawkins the Appellees, being present, said hearing having concluded, to which I certify.

A. F. CASTRO.

59 In the Supreme Court of Porto Rico.

No. 101.

ISABEL and JOSEFA DESMORNES, Appellants,
vs.
HEREDEROS DESCONOCIDOS DE ADOLFO DESMORNES, Respondents.

Appeal from a Judgment Rendered by the District Court of Humacao.

Opinion of the Court by Mr. Justice Wolf.

SAN JUAN, PORTO RICO, *28th of February*, 1907.

On the 16th day of January, 1907, this Court dismissed the case of Isabel and Josefa Desmornes vs. Herederos Desconocidos de Adolfo Desmornes because of the failure of the appellant to comply with rule 54 of this Court. The appellant has now filed a motion asking the court to revoke the order made by it, and to reinstate the case.

At the time when the motion to dismiss the case was filed, the appellant urged that he had not presented a brief as required by rule 54 because he understood in good faith, and it was his belief, that such brief was unnecessary, and not required by the rules of the Court in cases in which with the appeal itself there was presented a statement of the case, in which said bill the appellant had complied with the same requirements prescribed by rule 54.

In the motion to reinstate the appellant urges in addition that he has always been diligent in the case. That even if he had not

mistaken the requirements of the rule, he could not have prepared his brief much sooner, as a copy of the statement of the case was not handed to him by the Secretary of the District Court until the 24th of December, 1906. Furthermore, that as soon as it was brought to his knowledge that application for dismissal had been made he promptly mailed a copy of the brief to Mr. Texidor with the request that the latter file the same in this Court.

60 Our attention is called to several authorities to the effect that this Court, in its discretion, may reinstate a case where a dismissal has been made for the failure to comply with the rules, and where the appellant gives a good and reasonable excuse for his failure, and we have no doubt of our power in the premises. Indeed the principal contention of counsel of appellee is that the discretion of the court should not be exercised in this case.

We notice that the brief finally presented by counsel for appellant contains the same matter which was appended to the statement of the case. The question then arises, has the appellant shown himself entitled to the indulgence of this Court when it is evident that there was not a strict compliance with the rules of this Court until after the motion for dismissal was made. The practices in the various States differ as to the manner in which the filing of briefs is required by the Court. There are, decisions however, in which courts of appeals have under less stringent rules dismissed for failure to file a brief.

Missouri Pac. Ry. Co. v. Illig, 20 Mo. App. 327.
Conkling vs. Cameron, 3 Okl. 525, 41 Pac. 609.
Shanks vs. Carroll, 50 Tex. 17.
Smith vs. Tenney, 60 Ill. App. 442.

This Court will generally insist upon the strict compliance with the rules. Cases are generally not set until the brief for the appellant has been filed and the time for the appellee to file his reply brief has expired.

In the case before us, however, we think that the appellant showed a disposition to comply with the practice of the Court as he understood it. Indeed in the case of Marcelino Solá Rodriguez vs. Pedro Orcasitas Muñoz this Court ordered a statement to be prepared which should contain the error alleged and the grounds on which the appellant would base his appeal. In that case attorney for appellant here was counsel for appellee and might have fallen into error by his failure to understand the exact nature of the order therein made by us. Under these circumstances we think the dis-

61 cretion of the court should be exercised to reinstate the case.

ADOLPH G. WOLF,
Associate Justice.

In the Supreme Court of Porto Rico.

No. 101.

ISABEL & JOSEFA DESMORNES, Appellants,
vs.
THE UNKNOWN HEIRS OF ADOLFO DESMORNES, Appellees.

Appeal from a Judgment Rendered by the District Court of Humacao.

Sentence.

SAN JUAN, PORTO RICO, *February 28th*, 1907.

This Court has carefully examined the motion presented in the above cause by the Attorney for the Appellants, asking this Court to revoke its order of January 16th, 1907, by which said order the case of Isabel and Josefa Desmornes vs. The Unknown Heirs of Adolfo Desmornes was dismissed, and having considered the allegations of the appellee, for the reasons set forth in the preceding opinion, the Court hereby revokes its order of January 16, ulto. and the appeal continues in force.

We so decide, order and sign:—José S. Quiñonez—José C. Hernandéz—José Ma. Figueras—J. H. MacLeary—Adolph G. Wolf.

I, Antonio F. Castro, Attorney-at-Law, Secretary of the Supreme Court of Justice of Porto Rico, do hereby certify: That the foregoing opinion and sentence are true copies of the originals thereof and for the purpose of attaching hereto, I issue the present copy in San Juan, Porto Rico, this 28th day of February, 1907.

A. F. CASTRO,
Secretary of the Supreme Court.

62 In the Supreme Court of Porto Rico.

ISABEL & JOSEFA DESMORNES, Appellants and Plaintiffs,
vs.
THE UNKNOWN HEIRS, etc., Appellees and Defendants.

Action on Filiation.

Cayetano Coll Cuchi, Attorney for Isabel & Josefa Desmornes, appears before this Honorable Court and respectfully says:

That for the better information of this Honorable Court as well as to facilitate its work in deciding this case, and for the furtherance of the administration of justice, the appellants should present a supplementel brief, which said brief, shall contain in detail the facts and the law, on which the appeal is based.

Wherefore the permission of this Honorable Court is hereby re-

quested for the presentation of said brief, in the manner and time to be decided by this Honorable Court.

CAY. COLL Y.,P
Attorney for the Appellants.

Filed in my office this 11th day of March, 1907.

____ ____,
Secretary of the Supreme Court.

SAN JUAN, PORTO RICO, *March 11th*, 1907.

Granted as requested by the Court. The President thereof rubrics, to which I certify:
Rubric as stated.

63 In the Supreme Court of Porto Rico.

On Appeal. Civil No. —.

JOSEFA E ISABEL DESMORNES, Plaintiffs and Appellants,
vs.
THE UNKNOWN HEIRS OF ADOLFO DESMORNES, Defendants and Appellees.

Action for Recognition of Filiation.

Supplemental Brief of the Appellants.

Facts.

The record of this appeal shows that Isabel and Josefa Desmornes presented a complaint to the District Court of Humacao to secure the legalization by firm judgment of their recognition as natural daughters of Adolfo Desmornes, which capacity they had enjoyed since they were born. When the hearing of the complaint took place in accordance with law, the prosecuting attorney representing The People of Porto Rico was present and a party named A. Burnet also appeared opposing the above referred to complaint, answering thereto with a general denial of the facts therein contained, which said answer is as follows:

"That although this claimant (A. Burnet) was thoroughly cognizant of the family affairs and history of the said Adolphe Desmornes y Bange he never has heard of and does not know of any other relatives of the said deceased Adolphe Desmornes y Bange.

"That although the claimants Josefa é Isabel Desmornes y Alvarez claim to be recognized natural children of the deceased Adolphe Desmornes y Bange as set forth in their petition presented to this Honorable Court your petitioner denies that they are natural children of the said Adolphe Desmornes y Bange or that they ever were recognized as such."

A day was set for an oral trial of the case, and upon proceeding thereto, the status of the allegations was as follows:

As to Plaintiffs: The original complaint claiming the following: the legalization by firm judgment of the status of natural recognized daughters which the plaintiffs had enjoyed since they were born.

64 As to the defendants:

(*a*) The prosecuting attorney representing The People of Porto Rico, made no obligation limiting himself to appear at the hearing;

(*b*) A writing in the form of an answer by A. Burnet, alleging that he is one of the heirs of Adolfo Desmornes, and requesting in his prayer of said answer to be declared "sole and only" heir of deceased.

NOTE.—It is well to note here the irregularity of this answer which should never have been taken into account by the inferior court, as it is not written in accordance with good rules of procedure

Section 110 of the Code of Civil Procedure.

Power vs. Gunn, 9 Pac. Rep. 575.

The controversy, then, was one of fact, and was set forth as follows:

Allegation of the Plaintiffs: That Isabel and Josefa Desmornes are the unknown natural daughters of Adolfo Desmornes.

Denial of Defendant-: That said plaintiffs are not such natural recognized daughters.

The point to be decided by the Court á quo, could not present itself more simple, and said Court should have limited itself to the only point controverted by the parties, as a Court of Justice, even with the consent of the parties, cannot decide questions which have not been brought to it through the allegations. (In Porto Rico by the complaint and the answer.)

Thenceforth the parties should have proceeded to substantiate *there* respective allegations, sustaining or denying, in the manner aforesaid. The appellants thereupon introduced their oral and documentary proof, and from said proofs, the veracity and credibility of which has not been questioned in any form, it appears:

First. That Adolfo Desmornes legitimate son of Derval Desmornes and Lidia Bange, died unmarried in Vieques, P. R., on the 2nd day of November, 1905.

Second. That the plaintiffs were natural recognized daughters of Adolfo Desmornes.

65 Third. That said natural daughters were recognized by their father Desmornes, through unquestionable writings of the latter:

The letters addressed to his daughters which form a part of this Record.

Fourth. That said natural *natural* daughters always enjoyed the status of such while living with their father:—

Because he supported them:

Because he treated them as such in the community in which he lived; and

Because he presented them as such.

In accordance with this evidence and the allegations, secundum allegata et probata, the District Court of Humacao should have decided the controversy.

Judgment of the District Court of Humacao.

"Dismisses" the complaint because the action had prescribed under the limitations imposed upon actions of this class by Civil Codes of 1889 and of 1902.

Errors of Law Made by the District Court of Humacao in the Judgment Rendered on the 20th of August, 1906, in This Cause.

1st. The District Court of Humacao committed error of law in deciding that the action of the plaintiffs had prescribed.

2nd. The District Court of Humacao committed grave error of law in deciding that "as it appears from the proofs that the plaintiffs reached their majority more than two years before the present Code took effect (1902) the action had prescribed by both laws." Or, by the Civil Codes of 1889 and 1902.

3rd. The District Court of Humacao committed error of law in deciding that "it is not the date of the birth of the child that determines the law that shall apply in an action for recognition, but the date on which the recognition took place."

4th. The District Court of Humacao committed error of law in deciding this controversy without considering the proofs produced at the oral trial.

5th. The District Court of Humacao committed error of fact in deciding that the acts of recognition done by Adolfo Desmornes unto her daughters, were posterior to the promulgation of the Civil Code of 1889.

66 6th. The District Court of Humacao committed error of law in deciding "that the proofs of acts done by Adolfo Desmornes on the date mentioned, (posterior to the year 1889, date of the promulgation of the Code) is the only one the Court can consider in rendering judgment."

First Error.

The District Court of Humacao committed error of law in deciding that the action had prescribed:

(*a*) Because such declaration did not correspond to the status of the allegations: The Court therefore decided a question which had not been submitted to it by the parties, nor had it been the object of controversy, infringing the universal maxim of law that judgments should be secumdum allegata et probata.

It is a principle recognized by all Legislations, that judges cannot decide any other questions than those brought forth in due time

and which form the issue or controversy submitted to them. This sound doctrine does not belong exclusively to our present Law of Procedure as it existed in Porto Rico with the old Code of Procedure and the jurisprudence of the Supreme Court of Spain upholds it.

The Sentencing-Court cannot make deliberations which have not been asked for in due time by the parties.

Sentence of Supreme Court of Spain June 15, 1883.
" " " " July 2, 1885.

It is doctrine, in conformity with Law 16, Title 22, Part 3 and to the jurisprudence relative to questions brought forth at the primary trial, that other points brought forth after the debate of the parties has taken place, should not be decided thereunder; and the parties are not allowed to change the method of defense after said trials.

Sentence of Supreme Ct. of Spain, May 3, 1884.
" " " " " 20, 1885.

Don Emilio Reus, the great commentarist, commenting on the Law of Civil Procedure of Spain, in Book 1, Page 239, says:

"This precept not only has numerous precedents in our own legislation and juris-prudence and that of foreign countries, but it is accepted by good principles of law of procedure and logic."

"The judgment should limit itself to decide questions raised in due time and discussed in the action."

Sentence of Supreme Ct. of Spain, Feb. 26, 1867.

67 "The question litigated being determined and supported with the respective allegations, the judgment, to be effective, should be rendered in accordance with the terms to which the controversy has been reduced."

Sentence Supreme Ct. of Spain, June 23, 1868.

This old principle of Spanish Procedure has been left in force by the new Code, as the American juris-prudence is exactly the same as Spanish.

The laws limiting the time in which civil actions should be brought are "Statute of Limitations" and the philosophical foundation of same is found in the presumption that a person in possession of a right will not delay in exercising it if he is able so to do.

The object of prescription is to avoid and suppress fraudulent and unwarranted claims, avoiding the commencement of suits after an extensive period of time has elapsed since the occurrence of the fact that should have been the original cause of action, making impossible the preparation of a just defense on account of the death of witnesses, the losing of documents, etc.

Letson *vs.* Kenyon, 68 Cal. 52.
Taylor vs. Miles, 5 Kan., 499.
Greenval *vs.* Appel, 17 Fed. Rep. 140.
Hwiley vs. Cox, 2 N. W. Rep., 705.

To allege prescription was considered anciently dishonest and those allegations were not favored in the least by the Courts; consequently, it is impossible to find many cases where a Court has declared an action prescribed, when the defendant has not alleged it in his defense.

Hurley *vs.* Cox, 2 N. W. Rep. 705.
Perkins *vs.* Burbank, 2 Mas. 81.

Controversies are of fact or of law, in accordance with our Code of Civil Procedure. The first are brought by means of demurrer to the complaint, the latter by answer denying the statements therein contained or producing new matter.

In accordance with these provisions of the Code, prescription may be alleged by means of a demurrer to the Complaint,
68 when it is deduced from the face of the complaint, or by means of an answer. But it should be alleged in either case, setting forth the legal precept on which it is based.

Section 128 of the Code of Civil Procedure.

(*b*) Because the allegation of pre-cription or statute of limitations as a defense, is the personal privilege of the defendant, and an inalienable right that the Court should enforce. And said privilege may be renounced by the defendant; and when it is not alleged it is deemed to have been renounced.

The case of Grattan vs. Wiggins, 23 Cal. 24, has a great similarity with the one in appeal hereunder. A complaint was filed asking that defendant be sentenced to pay certain notes already due. Exceptions were taken first and the answer made later; in neither case the prescription of the action was alleged for the collection of said notes and the Court dismissed the Complaint on the ground that the action had prescribed. The Supreme Court reversed the judgment and the Judge who rendered the opinion of the Court, says:

"The defe e of prescription is a personal privilege * * * which if not alleged is considered renounced."

The same doctrine has been applied in the following cases, which we have carefully examined and there is not the least discrepancy in any of them:

Kelly vs. Kriess, 68 Cal. 210, and cases therein mentioned.
Reagan vs. Justice, 75 Cal. 253, 17 Pac. 195.
Cross vs. Moffat, 11 Cal. 210, 17 Pac. 771.
Davis *vs.* Davis, 20 Or. 78, 25 Pac. 140.
Duckett *vs.* National Bank, 39 L. R. A. 84.
Jennings *vs.* Richard, 10 Call. 395, 15 Pac. 680.
Chivington vs. Colorado, 9 Cal. 597, 14 Pac. 213.
Atchison *vs.* Fanner, 19 Cal. 559, 36 Pac. 541.

In the case of Cameron vs. City, 68 Cal. 390, 9 Pac. 430, the Court, in its opinion says:

"When of the Complaint proper it is deduced that the action has prescribed the defense may be alleged by means of a demurrer. When it does not appear from the Complaint, by answer."

That is to say, that in either case, said defense should be alleged or it is considered to have been renounced. The Court in
69 that same opinion cites the cases of Ord. vs. de la Guerra, 18 Cal. 75, Barringer vs. Warden, 12 Cal. 314 and Miles vs. Thorne, 38 Cal. 335, which we have examined and the same doctrine is therein set forth. In those three cases exceptions were made to the Complaint and prescription was alleged, the Court not having considered same for the reasons given in the referred to judgments, but always in accordance with the doctrine which we are defending.

In People vs. Broadway, 31 Cal. 45, the Court says:

"If prescription constituted a defense it should have been alleged by demurrer or by answer."

Brown vs. Martin, 25 Cal. 82.

This doctrine is clearly set forth by the following authors and opinions of Courts:

2 Burr. Dict. 99.
Co. Litt. 128, *a*.
3 Black. Comm. 313.
Steph. Plead. 124.
1 Chit. Plead. 152.
Deer Lodge vs. Kohrs, 2 Mont. 66.
Boggs vs. Merced, 14 Cal. 274.
Crockett vs. Lee, 7 Wheat. 520.
Land vs. Cowan, 19 Ala. 300.
Trapnall vs. Bird, 22 Ark. 17.
St. Andrews vs. Campbell, 5 Fla. 665.
Phelan vs. Phelan, 12 Fla. 354.
Hyer vs. Caro, 17 Fla. 354.
West vs. McCarthy, 4 Blackf. 246.
Phelps vs. Elliot, 35 Fed. Rep. 461.
Morgan vs. Crabb, 3 Port. (Ala.) 473.
Ex parte Bergemann, 4 Pac. Rep. 209.
Wallace vs. Farmers, 130 Cal. 578.
Neilin vs. Rogers, 21 Fed. Rep. 103.
Leavit vs. Oxford, 1 Pac. Rep. 356.
Grant vs. Burr, 54 Cal. 298.
Tarbox vs. Supervisors, 33 Wis. 445.

In the "Reporters" can be found more than two hundred cases which we have examined and there is not the least discrepancy amongst them.

Second Error.

The District Court of Humacao committed error of law in deciding "that as of the proofs it appears that the plaintiffs reached their majority more than two years before the present Code took effect (1902) the action had prescribed by that Code and the Code of 1889."

70 The law that governs all rights of the plaintiffs in this case is The Toro No. 11, or, Law 1, Title 10 of the New Compilation.

The said Toro Law says:

"And so that there may be no doubt who are natural children, we order and command that said natural children are: those whose fathers at the time of birth or thereafter, could marry their mothers, without dispensation and the father should recognize them as such; in case he is not married, or where it was had with some other woman who is single: When these conditions are attendant upon said child we command that he is a natural child.

"The Ancient Wise Men called natural or illegitimate children, those borne out of wedlock according to law; as well as those had with licensed woman.

Part 4th, Title XV, Law 1:

Actions and rights acquired prior to the operation of the Codes should be governed by anterior legislation, and in this case the law that determines the rights of the plaintiffs is the above mentioned Law of Toro.

As to the Code of 1902 it cannot be imagined even for a moment that a person, by its mere promulgation, should have lost a right acquired under the previous laws.

As to the Code of 1889 the Supreme Court of Spain has expressly declared that said Code does not govern the rights of children born under the Toro Laws or "Leyes de Partida" compiled in the New Compilation, the principles of which are the ones that should be applied.

Sentence of July 9, 1896, and of September 23, 1898.

Third Error.

The District Court of Humacao committed error of law in deciding that "it is not the date of the birth of the child that determines the law that shall apply to the action for recognition, but the date on which the recognition took place."

The Supreme Court of Spain in its sentence of July 9, 1896, laid down the principle that it is evident that the right of minors
71 to be recognized as natural children of a decedent should not be governed by Articles 131, 133 and 135 of the Code in conformity with the provisions of Rule 5 of the Law of May 11, 1888, but by Law 11 of Toro, or Law 1, Title V, Book X of the New Compilation, because the date of the birth of said minors is anterior to that on which the Code referred to was enforced.

Scaevola, Jurisprudence of the Civil Code, Book 1, Page 320.

The 4th, 5th and 6th errors committed by the District Court of Humacao are based upon universally recognized principles of law, on the consideration the Court will make of the proofs introduced, it therefore being unnecessary to extend this brief with arguments on matters of fact.

Wherefore the Court in pursuance of Section 306 of the Code of Civil Procedure, amended by Section 2 of An Act to amend said

Code approved March 8th, 1906, page 65 of the Spanish edition, should reverse the judgment of the District Court of Humacao and enter such as may be warranted in accordance with the proofs furnished and the prayer of the plaintiff.

Respectfully submitted,

CAY. COLL CUCHI,
Attorney for the Appellants.

San Juan, Porto Rico.

March 18th, 1907.—For opinion. It was so decided by the members of the Court and the President thereof rubrics, to which I certify:

Rubric as stated.

A. F. CASTRO.

On March 20th, this appeal was delivered to Mr. Justice Figueras.

Porto Rico, April 5th, 1907:—The hearing of this appeal will take place on the 11th day of the current month and following working days thereafter at 9 o'clock A. M.

It was so decided by the Court and the President thereof rubrics, to which I certify.

Rubric as stated:

A. F. CASTRO.

72 In the Supreme Court of Porto Rico.

ISABEL & JOSEFA DESMORNES, Plaintiffs and Appellants,
vs.
THE UNKNOWN HEIRS OF, etc., Defendants and Appellees.

Filiation.

Memorandum of Authorities Not Quoted in the Brief of the Appellants.

As prescription has been established on account of the general interest and consequently is of public right, nobody can renounce it beforehand. If it could be so renounced beforehand, the contracts would bear that style and formula, upon request of the creditors, who would always have interest therefor, and in this manner the intention pursued by the law would fail; wherefore, when the prescription has been acquired, it becomes a private right which may be renounced at will. This renunciation may be express or implied: it is express, when consent is made formally or with clear and determinating words; it is implied, when it results from the fact of the supposed abandonment of an acquired right, viz: if a possessor of an hereditament already prescribed should lease it from the former owner, or when a debtor asks time to settle a debt which has already prescribed. In order to renounce it, the power to alienate is necessary, as the renunciation is the real abdication of a right; conse-

quently it cannot be done by a minor, nor one whose property is subject to judicial proceedings. Judges cannot of their own motion produce the means of prescription in civil actions, as the party who has not pleaded thereto may yield to the call of his conscience.

Escriche's Law Dictionary—Word "Prescription":

"Persons with the capacity to alienate may renounce the prescription acquired, but not the right to prescription in the future.

"Prescription shall be understood as renounced in an implied manner when the renunciation arises from facts which lead to the supposition that the right acquired has been abandoned."

Article 1935 of the Civil Code of Spain.

"Persons with the capacity to alienate may renounce the prescription acquired, but not the right to prescription in the future.

"Prescription shall be understood as renounced in an implied manner when the renunciation arises from facts which lead to the supposition that the right acquired has been abandoned."

Section 1836 of the Civil Code of Porto Rico.

73 "Prescription cannot be renounced in advance but may be renounced when acquired.

"The renunciation of prescription is express or implied: implied renunciation results from the supposed fact of the abandonement of an acquired right."

Articles 2220 and 2221, Civil Code of France.

See the Review of the Courts, year 1897, page 305.

CAY. COLL Y CUCHI.

On the 11th day of April the Court being constituted with Messrs. Quiñonez, President and Associate Justices, Hernandez, Figueras, MacLeary and Wolf, the hearing of this appeal took place: Don Cayetano Coll y Cuchí, Attorney for the Appellants and W. H. Hawkins, for the Appellees being present and having informed: The Court thereupon declared the hearings ended and the Cause ready for delivery of judgment, I certify:

A. F. CASTRO.

In the Supreme Court of Porto Rico.

JOSEFA É ISABEL DESMORNES Y ALVAREZ, Plaintiffs,
vs.
THE UNKNOWN HEIRS OF ADOLFO DESMORNES Y BANGE, Defendants.

Action for Recognition of Filiation.

Brief of A. Barnet, Defendant, in Opposition to the Claims of Josefa e Isabela Desmornes as the Heirs — Adolfo Desmornes y Bange, Deceased.

The distribution of or succession to the property of a deceased intestate is determined and controlled by the law of domicile in the

case of personal property and by the law of the place in case of real property in force at the time of the death of the deceased.

2 Kent's Commentaries, Lecture 371.
Story, Conflict of Laws, Sec. 337.
Estate of Apple, 66 Cal. 432.
Luis Estate, 32 La. Ann. 385.
Wharton, Conflict of Laws, Sec. 576.
" " " " 576 (*a*).
" " " " 576 (*b*).
" " " " 243.
" " " " 250 (*a*).

74 Minor, Conflict of Laws, Sec. 99.
Zamaretti vs. Zamaretti, 21 Clunet 562 (France).
Lawrence vs. Kitteridge, 21 Conn. 576;
Beal's cases on conflict of laws, Vol. II, p. 253-8;
Cases cited Vol. I, L. R. A. Dig. p. 529.

Since the domicile of the deceased Desmornes and the situs of the property are both Porto Rico, the laws of Porto Rico at the time of the death of Desmones determine the descent and distribution of his property inasmuch as he died intestate.

The testate succession is determined on similar principles by the law of the place in force at the time of the death. See:

Moultrie vs. Hunt, 23 N. Y. 394;
Robertson vs. Pickerell, 109 U. S. 608;
Compare also Re Devoe, 57 L. R. A. 537;

It is contended that Law 11 of Toro determines the right of the claimants to inherit; but this contention confounds the law determining the status with the law determining what individuals are entitled to succession; the law of Toro may have determined these complainants to be legitimate or illegitimate children, but the Civil Code, which was in force at the time of the death of the deceased in November, 1905, determines what individuals possessing the status of legitimacy or illegitimacy shall inherit, that is to say, what status is required of the individual in order to inherit. In fine, the law in force at the time of the birth of the claimants may determine their status but it must be left to the law in force at the time of the death of the deceased to determine to what individuals possessing a certain status the property shall descend.

As to what fixes the status, see Note, 65 L. R. A. 177;

Legitimate and acknowledged illegitimate children succeed to the property of their ancestors.

Civil Code, Section 905;

In default of lawful or acknowledged illegitimate issue, ancestors inherit from decedent.

Civil Code, Section 909;

75 Acknowledged illegitimate children can inherit the same as lawful children.

Civil Code, Section 913;

In the absence of children, lawful or acknowledged illegitimate or ancestors, then the collateral relatives succeed to the property of the decedent.

Civil Code, Section 914;

In default of lawful or acknowledged illegitimate children, ancestors or collaterals within the sixth degree

Civil Code, Section 922;

the People of Porto Rico succeed to the property of the deceased, that is to say, the property escheats.

Civil Code, Section 923.

Unless the claimants have proved themselves as possessing the status of ancestors, or legitimate or acknowledged illegitimate children, or collaterals, they cannot succeed to any part of the property of the deceased Adolfo Desmornes.

Law of form governs the remedy:

Pritchard vs. Norton, 106 U. S. 204.
Scudder vs. Union Bank, 91 U. S. 406.
Bank vs. Donnelly, 8 Peters 361.
Minor, Conflict of Laws, p. 505.

Up to the time of the Code of 1889 the only right held by the plaintiffs was the right to proceed to get a certain status, i. e., a remedy to get a vested right. That remedy was never exercised and no right obtained that is now being violated or not recognized.

On the trial the testimony in regard to Josefa being an acknowledged illegitimate or simply a natural child of the deceased may be disregarded because of its being so slight. As to the claimant Isabela or "Pipia" the letters introduced in evidence and signed by the deceased and addressed to "My dear Daughter" and signed "Your father," the oral proof of various witnesses that he had addressed or spoken of Pepia as his daughter and the testimony of Isabela
76 herself that she had been treated always as his daughter merely shows paternity at most, and does not show that she was a duly acknowledged child of Adolfo Desmornes. In fact the claimant Isabela's own statement negatives any recognition on the part of Adolfo Desmornes in that she testified that about three years ago she started to have legal proceedings taken to secure recognition.

And she testified that the deceased Desmornes kept the letters now in evidence in his trunk presumably to prevent having any such action for recognition taken. The certificates of baptism contain no evidence of acknowledgment or recognition, and even if they did it would be to no effect unless there was proof also that Desmornes was present personally according to Section 51 of the Law of June 17, 1870 in regard to Civil Registries, in so far as certificates dated thereafter when this law was in force in Porto Rico.

The utmost that may be said of the proof introduced by the claimants is that the claimant Isabel might have taken legal proceedings before the deceased's death to force him to recognize her but that was never done.

If this action be regarded as one for filiation, which only goes to establish paternity and does not prove recognition or acknowledgment, then, in that case also the claimants fail to bring themselves within the provisions of the Civil Code determining distribution or succession, and further action is barred.

Section 199 of the Civil Code.

And lastly the allegations of the petition or complaint in this action show that the complainants were natural or illegitimate daughters, and counsel for the claimants conten- that as such they inherit, that their status was fixed by law 11 of Toro and the status cannot be changed subsequently. The law 11 of Toro is as follows:

"Natural child is that born or conceived at the time the father could marry the mother thereof without dispensation, and the father should always recognize him as such, and be be unmarried, and the woman with whom the child was had be single."

77 Therefore, according to the law in force at the time of the birth of the claimants it is seen that to be natural children there must have been recognition on the part of the father.

Law No. 9 of Toro shows that bastards or illegitimates cannot inherit even from the mother except in certain cases where the mother has no legitimate children.

Law No. 12 of Toro shows that even where an illegitimate has been legitimized by rescript or royal authority that even then he does not inherit if the father later has a legitimate child or one legitimatized by subsequent marriage with the mother.

It is therefore submitted that even according to the law of Toro claimants would not be entitled to succeed to the estate of Desmornes without showing an acknowledgment or recognition by him but further that the law could at most determine merely the status of the claimants at the time of their birth and does not in any way determine what individuals possessing what classes of status shall succeed; that the Civil Code in force in November, 1905, determines the successors or heirs to the said estate and that in the Civil Code there is no provision for an unacknowledged natural child.

Respectfully submitted,

WM. H. HAWKINS,
Attorney for A. Burnet.

Statute of Limitations matter of remedy.
Pretchard vs. Norton, 106 U. S. 124 to 130.
Bank vs. Donnelly, 8 Peters 361.
Story, Conflict of Laws, 576 et seq.
Minor, Conflict of Laws, 210.
Civil Code, Section 1840.

Filed in my office this 11th day of April 1907.

———,
Secretary of the Supreme Court.

78 In the Supreme Court of Porto Rico.

No. 101.

JOSEFA É ISABEL DESMORNES Y ALVAREZ
vs.
THE UNKNOWN HEIRS OF ADOLFO DESMORNES.

Appeal from Judgment Rendered by the District Court of Humacao.

Opinion of the Court, Delivered by Mr. Justice Figueras.

SAN JUAN, PORTO RICO, *June* 16, 1907.

The above named Josefa é Isabel Desmornes, the former married and resident of Patillas and the latter single, resident of San Juan, both of legal age, filed a complaint in the District Court of Humacao, under date of March 20th, 1906, alleging:

"First: That the said Don Adolfo Desmornes y Bange, a resident of the Island of Vieques, died unmarried in said Island of Vieques, on the 2nd day of November of the past year 1905, without leaving any testamentary dispositions as by law provided.

"Second: That said Desmornes left no legitimate descendants or ascendants who could have a preferential claim to inherit, but only left two natural or illegitimate children, had in his relations with Andrea Alvarez, which were baptized in the Immaculate Conception and Aposthol Santiago Parish, of the town of Isabel Segunda of said Island, there appearing in the annotation of Isabel's baptism, the recognition of natural daughter made by the decedent Desmornes, her father.

"Third: That the above mentioned children are the plaintiffs hereunder, who were always held and considered by decedent Adolfo Desmornes, in life, as his daughters, according them the protection, care and affection that a father always tenders to his daughters.

"Fourth: That in consequence of these acts done by Desmornes, the plaintiffs hereunder have been considered by nearly all the inhabitants of Vieques Island as the recognized daughters of said Desmornes, who, socially, never in his life did he conceal himself to say that plaintiffs were his daughters had during his carnal relations with his neighbor Andrea Alvarez.

"Fifth: That the decedent Adolfo Desmornes, from December 29, 1893 until February 16, 1904, addressed several letters to the plaintiffs hereunder, written of his own hand and signed by him, in which can be apparently seen, the paternal affection towards them: calling them my dear daughters and endeavoring to aid them in life as much as he could.

79 "Sixth: That upon entering of record in the books of the Parish of Vieques, the ceremony of the baptism of plaintiff Isabel Desmornes on the fourteenth day of October 1865, her father Don Adolfo Desmornes presented a statement subscribed and sworn to by him, by which statement he authorized the Parish Priest

thereof to consign in the books of the Parish the express recognition he made unto the said Isabel, and said statement written by Desmornes and filed in said Parish, has disappeared or been misplaced, the efforts made to secure this direct proof of recognition having been useless.

"Seventh: That the plaintiffs hereunder have made incessant efforts to ascertain whether there exists any person having a right or claim in this action, and according to information obtained from parties who were well acquainted with decedent Adolfo Desmornes, such as Dr. Guillermo Carreras and Antonio Torres Barba, a merchant, nobody exists in Porto Rico to oppose the just claim of the plaintiffs.

"Wherefore the above mentioned plaintiffs, Isabel and Josefa Desmornes, through their Attorney Juan F. Vias Ochoteco, pray this Honorable Court that judgment be rendered in their favor and against the defendants, by which judgment plaintiffs be adjudged natural recognized or illegitimate daughters of Adolfo Desmornes y Bange, with all the rights granted unto this class of children by the law as to the persons and properties of their parents, with imposition of expenses and costs to those who oppose this action.

In consequence of the said Complaint the publication of notices was requested and they were for-with published in "The Boletin Mercantil of Porto Rico," because Don Augusto Burnet appeared in said Court, calling himself a nephew of Don Adolfo Desmornes and denied that the plaintiffs were natural recognized daughters of said Don Adolfo Desmornes or that they had ever been recognized as such, and concluded requesting to be adjudged "sole and only" heir of decedent with right to inherit all his property, which amounted to seven thousand seven hundred and forty five dollars and that it be furthermore decided that the complainants had no right whatsoever to any of said property.

Modesta Ramos, claiming to be represented by her mother Isidora Ramos and Bartola Delfina, also appeared, through Attorney Salvador Fullaondosa, alleging that they had the same right as the plaintiffs owing to the fact that they had continually enjoyed the status of natural children of Don Adolfo Desmornes, wherefore they
80 joined the complainants and requested to be declared natural or illegitimate children of decedent also.

The trial of the case took place on June 29th, 1906; The Attorney for the Plaintiffs, the Attorney for A. Burnet and the Prosecuting Attorney representing the People of Porto Rico appearing thereat and the Court after hearing the documentary evidence furnished, the testimony and both Attorneys, rendered judgment on August 20th, 1906, deciding that the law and the facts were against the plaintiffs and therefore dismissed the complaint estimating the costs at —— to be paid by said plaintiffs, ordering an attachment to be levied on their property therefor.

This judgment is based upon an opinion written by the Judge of the Court of Humacao, which is very important to know entirely to judge it clearly, and to know the grounds the said Judge had to decide in the manner aforesaid:

The said written opinion read as follows:

"This is an action brought by Josefa á Isabel Desmornes against The Unknown Heirs of Adolfo Desmornes, praying to be declared natural or illegitimate daughters of the deceased Adolfo Desmornes y Banga, in which action by order of this Court notices were published for a term of sixty days calling those who considered themselves with right, during which time Augusto Burnet, a nephew of decedent, appeared and answered the complaint. On petition of both parties, the Court set the hearing of the case for June 29, 1906, at which hearing, Attorney J. F. Vias appeared on behalf of the plaintiffs, The Prosecuting Attorney for the People of Porto Rico and Attorney W. H. Hawkins for the defendant. The Court after receiving the documentary proofs, the evidence and hearing the Attorneys of both parties, reserved its decision.

"The evidence in this case furnished by the plaintiffs is of acts done by Adolfo Desmornes at divers times, and during a period commencing with the year 1865 and ending in 1905. According to Law 11 of Toro, or Law, 1, Title 5, Book 10 of the New Compilation, the action for recognition can be exercised at any time during the life or after the death of the father; and according to the Civil Code of 1889 which repealed the Toro Laws, this action can only be exercised during the life of the presumptive father; and under the present Civil Code the action can be brought two years after becoming of age.

"The death of Adolfo Desmornes, presumptive father of the plaintiffs, occurred in the month of November, 1905, prior to the commencement of this action and as the proofs show that
81 plaintiffs reached their majority more than two years before the present Code took effect, the action has prescribed by both Laws. The plaintiffs do not aver that the provisions of the previous or present Civil Code should apply, but sustain that the law on which judgment should be based is Law 11 of Toro; that the recognition of children born prior to the enactment of the Civil Code of 1889 is governed by the provisions of the previous law and that if the anterior or present Civil Code are applied it would violate an accrued right and they refer to a decision of the Supreme Court of Spain of July 9, 1896, which says:

"According to rule fourth of the transitory provisions of this Code, the actions and rights originating prior to the publication hereof, should exist to such extent and under such terms as they were recognized under the previous law.

"Therefore, the right of a minor to be recognized as a natural child, in the former case, should be governed by Law 11 of Toro, or, Law 1, Title 10, New Compilation and not by Articles 131, 133 and 135 of this Code.

And Rule Fourth of the provisions relative to the publication of the Code of 1889, says:

"The juridic relations arising out of marriage as to the persons and properties of the spouses and of their descendants, paternity and filiation, patria potestas of husband and wife over their minor children, civil effects of contracts, and generally, all that constitutes

the right of family, shall be determined in accordance with the essential principles on which the present legal status is based except as to provisions of Rules 17, 18, 22 and 23."

The decision of the Supreme Court of Spain of July 9, 1896 and Rule Fourth hereinabove quoted, do nothing further than sustain a principle of law recognized of time immemorial by every civilized nation, namely that a repealed Statute remains as if it had never been in force, except as to transactions which have taken place and have been done prior to the repealing thereof, but the act of repealing the Statute leaves the civil rights of the parties acquired thereunder, unaltered.

It is not the date of the birth of the child that determines the law that shall apply to the action for recognition, but the date on which the recognition took place: the right accrues in the latter case and not in the former.

The Court is of the opinion that the proof of acts done by Adolfo Desmornes on the dates hereinabove mentioned is the last the Court can consider in rendering judgment. Where the Court
82 orders that judgment be entered in favor of the defendants. Humacao, Porto Rico, August 20th, 1906.—Chas. E. Foote, Judge of the District Court of Humacao."

From this judgment the plaintiffs Isabel and Josefa Desmornes appealed to this Supreme Court and they here appeared through their Attorneys and filed a statement of facts approved by the Judge of the inferior Court on November 14, 1906.

Thereafter the appellants and the appellee Burnet filed their Briefs and when the hearing took place they set forth such things as were proper to the interests of each.

The first question we should study and decide is, if the Judge should have declared the action of the plaintiffs to claim the right they allege in their complaint prescribed, when the prescription of the action had not been alleged in any manner. In other words, if the Judge, of his own motion, should have produced the prescription of the action to decide in the manner he has decided.

The only defendant who appeared and answered the Complaint was Augusto Burnet, who denied the right of the plaintiffs in general and alleged nothing regarding prescription.

Section 199 of the Code of Civil Procedure provides that when the complaint is not challenged, either by demurrer or by answer, it should be understood that defendant renounces his right thereto, save only the competency of the Court and cases where the Complaint does not set forth sufficient facts for a cause of action. Section 128 of the same Code corroborates this, by establishing the manner in which prescription should be alleged and if said allegation is challenged, the party claiming it in his behalf, is compelled to prove at the trial, the facts on which prescription of action is alleged.

So that when the Judge of his own motion produced the means of prescription, he *prescrinded* from the duty that the law imposes on the defendant of alleging and proving it in time and of the right of the plaintiff of denying said allegation.

83 And this cannot be done within good rules of procedure:

"The allegation of the statute of Limitations as a defense is a personal privilege of the debtor, which he may use or renounce at will, but it should be interposed in some manner, either by demurrer or answer, or it shall be deemed to have been renounced."

Grattan vs. Wiggins, 23 Cal. 25.
Kelley vs. Kriess, 68 Cal. 213.

"When of the face of the complaint it is clearly apparent that the Statute of Limitations is applicable, the objection may be made by demurrer. When nothing appears in the Complaint relative thereto, the objection should be made by answer."

Ord vs. de la Guerra 18 Cal. 75.
Barringer vs. Warden, 12 Cal. 314.
Miles vs. Thorne, 38 Cal. 335.
Cameron vs. San Francisco 68 Cal. 391.

So that the law and jurisprudence of the Supreme Ct. of the State of California, consider the allegation of prescription renounced, when it has neither been alleged by demurrer or by answer.

And the reason is obvious. The prescription of an action, generally and within the Revised Civil Code and the former Code is subject to, the proof of interruption and that proof would be unnecessary where it has in no manner been alleged by the defendants or in other words, where it has not been the object of debate.

There is another reason of a moral order which is expressed by Escriche in his Law Dictionary, and to which the Attorney for the Plaintiffs refers in his "Memorandum of Authorities":

"Judges—he says—cannot of their own motion produce the means of prescription in civil actions, as the party who has not pleaded thereto, might yield to the call of his conscience."

And we believe that for the foregoing reasons it is clear that error has been committed by the Sentencing Court, and its judgment should be reversed.

It might be objected that the facts do not constitute a cause of action because the plaintiffs do not say in their complaint that they are under 23 years of age to be in a position to establish the
84 action granted them by Section 199 of the Revised Civil Code.

But this has not been alleged in the answer and in any event would constitute a demurrer of lack of legal capacity to sue, which does not mean, sufficient facts to constitute a cause of action.

De Belt vs. Carter, 31 Ind. 355.
People vs. Crooks, 53 N. Y. 468.
Pomerey on Remedies, Sec. 208.
See Pomerey Code of Civil Procedure of California, page 209.

But we have her-tofore said that we had a statement of facts approved without amendments by the Judge of the District Court of Humacao for consideration, and we should give it due attention, to deduce whether or not the right claimed by the plaintiffs has been proved.

Eleven witnesses of representation testified at the hearing and they all agree that the plaintiffs named Josefa and Isabel were publicly held and considered as daughters of Don Adolfo Desmornes, it being well to observe, that among said witnesses are, Doctor Guillermo Carreras who attended Don Adolfo in his last illness, Don José A. Vera, Collector of Internal Revenue of Vieques and Don Modesto Rios, Justice of the Peace of that Island.

The first states that he told Desmornes to fix his matters up and the latter replied several times: "I have no matters to fix Doctor, because I have no other heir but my daughter Isabel"—and that the latter lived in Desmornes' house and assisted him always as a good daughter.

The second or the Collector stated that as Don Adolfo owed taxes, he came one day to his office and said: "I will send my daughter to pay them and a few days later his daughter Pipia, whose proper name he thinks is Josefina, although it looks more like Isabel, presented herself and paid in her father's name the first semetre of taxes."

85 The Justice of the Peace states that he has held that office for seven years and that he knows that Desmornes, unmarried, had two daughters, one nick-named Pipia, possibly Isabel, and the other called Josefa; that he advised Desmornes once to testate and he replied that his daughter Pipia would arrange his matters; that the latter assisted him in his last illness and that Desmornes lamented on one occasion—before the deponent—because his other daughter Josefa came one day to see him and departed immediately, leaving him ill.

All the other witnesses substantially declared as to the certainty of public consideration and the status of daughters that the plaintiffs enjoyed before Don Adolfo Desmornes, it having been furthermore proved that he died unmarried.

Besides this, there are sixteen letters which were lost according to the testimony of Isabel, and when Don Adolfo died she found them in the bottom of a trunk. In 1903 she and her sister agreed to make a claim of recognition to their father based upon said letters, but as they were misplaced, she could do nothing at that time, aside from the fact that all the inhabitants of Vieques know that Desmornes was her father and considered her as such daughter.

Of those sixteen letters the hand-writing and signatures of which have been recognized by different witnesses as of Desmornes, several are addressed to Pipia, who is Isabel, and others to Josefa and in said letters, the appreciation and affection of a father is apparent; he nearly always styled them "daughters" and ended them "father" and in said letters speaks of his illness and of his financial condition which made it impossible for him to send them money.

But as regards Isabel, there is in her favor an important data, which alone would not be sufficient to determine her right, but that supported by the foregoing statements, decides the animus in her favor, to consider her really as the daughter of Don Adolfo Desmornes.

86 I refer to the record of her baptism, copy of which is attached to this Record. It is therein set forth that Isabel is natural daughter of Don Adolfo Desmornes and that she was born on the 29th day of November, 1865.

This special circumstance does not favor Josefa and perhaps the proof regarding her may have been somewhat weak, but the fact that Isabel, far from reproaching her, joins her in common and both exercise the same action and claim the same right under the same professional direction, makes it appear as if, that absolute conformity, reveals that they are both sisters, and that they always enjoyed equal consideration, as daughters of Don Adolfo Desmornes.

The possession of the status of natural child only requires the continuation of facts that may present that person as regards another, in an uninterrupted relation thereto, in the capacity of such natural child, and the proofs presented in this cause, shows that persistent relation of facts.

Some witnesses refer to other children and as hereinabove stated, in this Record, there appears a petition of Modesta Ramos and Bartola Delfina subscribed by Attorney Salvador Fulladosa, in which they state that they associate with Isabel and Josefa as claimants, because they have the same right, on account of having been in the constant enjoyment of the status of daughters of Don Adolfo.

But neither one has presented any proof, nor have they even been mentioned in the judgment, or have they taken an appeal therefrom.

Consequently we cannot make any declaration regarding them.

Regarding Isabel and Josefa, the Court of Humacao, made no express declaration as to the right they claimed; but they furnished their proofs and it has been duly submitted to us in proper form for study and consideration.

Said proofs completely are in their favor.

87 The law approved March 8, 1906, which was operative on April 1st of the same year and which amended Section 306 of the Code of Civil Procedure, says:

"When the judgment, order or decree of an inferior court is reversed, the Court shall proceed to render the judgment, order or decree which should have been rendered by the lower court, save etc."

Hence reversing the judgment appealed hereunder as it should be reversed without express imposition of costs, another should be rendered declaring that Isabel and Josefa Alvarez are natural daughters and should be considered to have been recognized by Don Adolfo Desmornes y Bangé and that they should succeed him with all the rights that the Civil Code in force at the time of the death of said Desmornes, grants unto this class of children.

JOSÉ M. FIGUERAS,
Associate Justice.

In the Supreme Court of Porto Rico.

No. 101.

JOSEFA É ISABEL DESMORNES Y ALVAREZ
vs.
THE UNKNOWN HEIRS OF ADOLFO DESMORNES.

Appeal from Judgment Rendered by the District Court of Humacao.

Judgment.

SAN JUAN, P. R., *June 18th*, 1907.

This Court has carefully examined the Record and considered the allegations of the parties and for the reasons set forth in the foregoing opinion reverses the judgment rendered in the above entitled cause on August 20th, 1906, by the District Ct. of Humacao and declares instead that Isabel and Josefa Alvarez are natural daughters and should be considered to have been recognized by Don Adolfo Desmornes y Bange and should inherit from him with all the rights that the Civil Code in force at the time of the death of said Desmornes grants unto this class of children, without express imposition
88 of costs. Inform lower Court with copy of this judgment and foregoing opinion for the purposes therein set forth.

It was so decided by a majority of the Court composed of Messrs. Quiñonez, President, and Associate Justices Hernandez and Figueras: Messrs. MacLeary and Wolf, dissenting.

We so decide, command and sign: José S. Quiñonez, José C. Hernandez, José Ma. Figueras.

I, Antonio F. Castro, Attorney-at-Law, Secretary of the Supreme Court of Justice of Porto Rico, Do hereby certify: That the preceding opinion and judgment are true copies of the originals thereof; and for the purpose of attaching it to the Record of the case, I issue the present copy in San Juan, P. R., this 18th day of June, 1907.

A. F. CASTRO.
Secretary Supreme Court.

On the 25th day of June, a certified copy of the preceding opinion and judgment were forwarded to the District Court of Humacao for its information.

A. F. CASTRO.

In the Supreme Court of Porto Rico.

JOSEFA É ISABEL DESMORNES Y ALVAREZ
vs.
THE UNKNOWN HEIRS OF ADOLFO DESMORNES.

Now comes, Augusto Burnet, one of the defendants, and respectfully appears before this Honorable Court, through his attorneys Sweet & Wilcox, and says that he does not agree with the decision of the Honorable Supreme Court in the above entitled cause rendered on June 18th, 1907, and appeals from same to the Supreme Court of the United States, at Washington, D. C.

San Juan, March 17, 1909.

SWEET & WILCOX,
Attorneys for Defendants.

Filed in my office on this 17th day of March, 1909.

____ ____,
Secretary Supreme Court.

89 In the Supreme Court of Porto Rico.

No. 101.

JOSEFA & ISABEL DESMORNES Y ALVAREZ, Plaintiffs and Appellants,
vs.
THE UNKNOWN HEIRS OF ADOLFO DESMORNES, Defendants, & etc.

Record of the Appeal Taken from Judgment Rendered by District Court of Humacao in Action for Recognition of Filiation.

Order.

SAN JUAN, P. R., *March 25th*, 1909.

The appeal taken to the Supreme Court of the United States, from the judgment rendered in the above entitled cause on June 18th, 1907, is admitted: the bond to be furnished by A. Burnet is fixed at One Thousand Dollars for costs and sixty days are granted for the preparation and translation of the Record to be sent to the Supreme Court of the United States.

It was so ordered and signed by the members of the Supreme Court.

JOSÉ C. HERNANDEZ.
JOSÉ MA. FIGUERAS.
J. H. McLEARY.
ADOLPH G. WOLF.

I, Ernst Jaenecke, Official Translator of the Supreme Court of Porto Rico,

Do hereby certify, that the preceding documents are true and exact translations of the respective originals in Spanish.

E. JAENECKE,
Official Translator of the Supreme Court of Porto Rico.

90 Supreme Court of Porto Rico.

No. —.

AUGUSTO BURNET et al., Defendants & Appellees,
vs.
ISABEL & JOSEFA DESMORNES, Plaintiffs & Appellants.

Appeal from Judgment Rendered by the District Court of Humacao in Action for Recognition of Filiation.

Bond on Appeal to the Supreme Court of the United States.

UNITED STATES OF AMERICA,
The President of the United States, ss:

Know all men by these presents, that we A. S. Stevens and H. A. C. Hines are held and firmly bound unto Isabel & Josefa Desmornes in the full and just amount of one thousand dollars to be paid unto said Isabel & Josefa Desmornes, their certain attorneys, executors, administrators or assigns: to which payment, well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 18th day of August in the year of our Lord one thousand nine hundred and nine.

Whereas, lately at a session of the Supreme Court of Porto Rico, in a suit pending in said Court, between Isabel & Josefa Desmornes, plaintiffs, and the unknown heirs of Adolfo Desmornes et al., defendants, a judgment was rendered against the said defendants and the said defendants having obtained an appeal to the Supreme Court of the United States to reverse the judgment in the aforesaid suit, and a citation having been directed to the plaintiffs, citing and admonishing them to be and appear at a session of the Supreme Court of the United States to be holden at the City of Washington, District of Columbia.

Now, the condition of the above obligation is such that if the said A. Burnet shall prosecute his appeal to effect and answer all costs, if he fails to make his plea good, then the foregoing obliga-
91 tion is to be void: else to remain in full force and vigor.

A. S. STEVENS.
H. A. C. HINES.

The above instrument has been signed and acknowledged before me by Messrs. A. S. Stevens and H. A. C. Hines, this 18th day of August 1909.

A. F. CASTRO,
Secretary of the Supreme Court.

Approved, this 18th day of August, 1909.
JOSÉ C. HERNANDEZ,
Chief Justice.

92 In the Supreme Court of Porto Rico.

JOSEFA E. ISABEL DESMORNES
vs.
THE UNKNOWN HEIRS OF ADOLPH DESMORNES et al.

Assignment of Errors.

The appellant in the above entitled cause, in connection with his petition for appeal herein, presents and files therewith his Assignment of Errors, as to which matters and things he says that the judgment entered herein, on the — day of ——, 190–, is erroneous, to wit:

I.

The court erred in holding that the statute involved is a statute of limitations and not jurisdictional in its character.

II.

The court erred in holding that the trial court was without authority to dismiss the action of plaintiffs of its own motion, for the reason that said statute, being jurisdictional in its character, the court was authorized to refuse to consider said cause after its lack of jurisdiction became apparent.

III.

The court erred in directing the District Court to enter a judgment against appellant.

IV.

The court erred in reversing the judgment of the District Court and in ordering said District Court to enter a judgment for Defendants in Error.

Wherefore, the appellant prays that said judgment may be reversed and that the appellant may have an adjudication and judgment in his favor.

WILLIS SWEET,
Attorney for Appellant.

93 In the Supreme Court of Porto Rico.

UNITED STATES OF AMERICA,
The President of the U. S., ss:

To Josefa E. Isabel Desmornes y Alvarez:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States to be holden at the City of Washington, D. C., within 60 days from the date of this writ, pursuant to an appeal filed in the office of the Secretary of the Supreme Court of Porto Rico, in a certain cause lately pending in said Court wherein you are the appellees and plaintiffs and Adolfo Burnet the defendant and appellant, to show cause, if any there be, why the judgement of said Court therein rendered should not be reversed and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable José C. Hernandez, Chief Justice of the Supreme Court of Porto Rico, at the City of San Juan, this the 27th day of May, 1909.

JOSÉ C. HERNANDEZ
Chief Justice.

Attest:

[Seal Supreme Court of Porto Rico, United States of America.]

A. F. CASTRO.
Secretary of the Supreme Court of Porto Rico.

I hereby accept service of the above citation on this the 27th day of May, 1909.

CAY. COLL CUCHI,
Attorney for the Plaintiffs and Appellees.

94 In the Supreme Court of Porto Rico.

ISABEL & JOSEFA DESMORNES
versus
THE UNKNOWN HEIRS OF ADOLFO DESMORNES and AUGUSTO BURNET.

Petition for Extension of Time.

To the Honorable Justices of the Supreme Court of Porto Rico or to any Justice of said Court:

Augusto Burnet, by his counsel, respectfully shows unto your Honors that the preparation of the record for an appeal in the above entitled cause is accompanied with such difficulty in the translation and certification of said record that the same is not ready to forward to the Supreme Court of the United States, whereupon counsel for Appellant respectfully petitions said Court for an extension of thirty

(30) days in which to file said record with the Clerk of the Supreme Court of the United States and your petitioner further shows that including Sundays and Holidays the sixty (60) days originally fixed, counting from the date of the citation issued in this cause, expired on the 26th instant, to wit: the 26th day of July, 1909.

Wherefore, your petitioner prays that said extension may be dated nunc pro tunc as of the 26th day of the present month.

San Juan, Porto Rico, July 28th, 1909.

SWEET & WILCOX,
By WILLIS SWEET,
Attorneys for A. Burnet.

Granted.

J. H. McLEARY,
Associate Justice Supreme Court of Porto Rico.

[Endorsed:] Filed in my Office with — copies on this 9 day of August, 1909. —— ——, Secretary of the Supreme Court of Porto Rico.

95 Supreme Court of Porto Rico.

Office of the Secretary.

UNITED STATES OF AMERICA.
Island of Porto Rico:

I, Antonio F. Castro, Secretary and Reporter of the Supreme Court of Porto Rico, do hereby certify: that the foregoing documents constitute the record in a certain case lately pending in said court wherein Isabel and Josefa Desmornes are Plaintiffs and Appellants, and the unknown Heirs of Adolfo Desmornes are Defendants and Appellees; that said documents have been faithfully translated into the English language, according to the certificate of official Interpreter and Translator of the Supreme Court of Porto Rico, which forms a part of this transcript, and that this transcript has been prepared under the exclusive directions of counsel for appellants herein.

In witness whereof, I hereunto set my hands and the Seal of said Supreme Court, at the city of San Juan, P. R., this 18th day of August, in the year of our Lord one thousand nine hundred and nine.

[Seal Supreme Court of Porto Rico, United States of America.]

A. F. CASTRO,
Secretary and Reporter of the Supreme Court of Porto Rico.

[Excise Tax Stamp, 50c., Canceled, August 16th, 1909. A. F. C.]

Endorsed on cover: File No. 21,832. Porto Rico Supreme Court. Term No. 133. Augusto Burnet, appellant, vs. Josefa and Isabel Desmornes y Alvarez. Filed September 21st, 1909. File No. 21,832.

Office Supreme Court, U. S.
FILED.
OCT 15 1912
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1911.

No. 11.

AUGUSTO BURNET,

APELLANT,

vs.

JOSEFA AND ISABEL DESMORNES ALVAREZ.

APPELLANT'S BRIEF.

WILLIS SWEET,
Attorney for Appellant

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1911.

NO. 133.

AUGUSTO BURNET,

APELLANT,

vs.

JOSEFA AND ISABEL DESMORNES ALVAREZ.

APPELLANT'S BRIEF.

STATEMENT.

The appellees brought an action in the district court of Porto Rico for the district of Humacao, the said action being designated in the law as an action for recognition of affiliation. They claimed to have been the illegitimate, but recognized children of Adolfo Desmornes, and the action was brought for the purpose of obtaining a judicial declaration of said recognition, the purpose having been to acquire the rights and interests in the estate of the deceased Adolfo Desmornes given by law to recognized illegitimate children.

In accordance with the law in the premises, the appellees

gave notice by publication to the unknown heirs of Adolfo Desmornes of the nature of the claim presented, and said notice advised said unknown heirs, if any there should be, of their right to appear within sixty days from the date of said publication and in whatever manner might be proper, to contest the claim of the appellees, as well as urge their own. (R. p. 21, in opinion of the court.)

Accordingly, the appellant appeared and answered said petition, and as the nephew of the deceased, denied the claims of appellees, claimed to be his only heir, asked to be declared such, and for a decree declaring him entitled to inherit all of the estate of the said Adolfo Desmornes, deceased. (R. p. p. 25-26.)

After the evidence, documentary and oral, had been submitted in behalf of plaintiffs, the court held that their right of action had prescribed by statute, and holding further that the statute was jurisdictional in its character, ordered that "judgment be entered in favor of defendant(s)". (R. p. 22.)

The plaintiffs appealed to the Supreme Court of Porto Rico. The Supreme Court reversed the district court and ordered that judgment be entered for plaintiffs.

The decision of the Supreme Court was based upon the theory that the statute in question (hereinafter set forth) was a privilege that might have been invoked by the defendants, either by demurrer or answer, but that not having been presented in any form, the defendants were deemed to have waived it. (R. p. p. 62-63.) Thereupon the Supreme Court, on the evidence submitted by plaintiffs, ordered that the judgment of the district court be reversed, and judgment entered for plaintiffs. The value of the estate in controversy, (probably assessed value) was $7.745. (R. p. 26.)

ASSIGNMENTS OF ERROR

As the assignments of error relied upon are very brief, we will set them forth at this place:

I.

The court erred in holding that the statute involved is a statute of limitations and not jurisdictional in its character.

II.

The court erred in holding that the trial court was without authority to dismiss the action of plaintiffs of its own motion, for the reason that said statute, being jurisdictional in its character, the court was authorized to refuse to consider said cause after its lack of jurisdiction became apparent.

III.

The court erred in directing the district court to enter a judgment against appellant.

IV.

The court erred in reversing the judgment of the district court and in ordering said district court to enter a judgment for appellees.

I.

THE LAW OF THE CASE.

The statute in question is explicit in its terms, and while more liberal than the former law on the subject, is nevertheless clear in its requirement that the action must be filed within two years after the claimant becomes of age.

The statute under which the action was brought is as follows:

"**Section** 198. (Civil Code of Porto Rico.) The filiation of children shall be proved by the certificate of the birth

issued by the civil registry, by the possession of the status of filiation, or by any other legal means."

"**Sec.** 199. An action to claim filiation may be filed at any time within two years after the child becomes of age, and it shall be transmitted to his heirs, if he should die during his minority, or in a state of lunacy. In these cases, an heir shall have five years in which to enter an action."

Such was the statute of Porto Rico, approved March 1, 1902. This was more than three years before the death of Desmornes. Isabela, one of the plaintiffs, was born in November, 1864. (R. p. 17; f. 23), and had therefore been of age for approximately sixteen years when Desmornes died. The record fails to show the date of Josefa's birth, but as appears from the alleged letters written her in 1904, she was then a married woman. (R. p. 17.)

If, then, it was necessary to comply with sections 198 and 199, the plaintiffs failed to bring themselves within the provisions set forth.

The sections quoted deal with the question of filiation, and now we present section 189, Civil Code of Porto Rico, which deals with the question of obligatory recognition. The section is as follows:

"**Section** 189. A father is obliged to recognize his illegitimate child in the following cases:

"(1) When there be an authentic statement in writing made by him expressly recognizing its paternity.

"(2) When publicly or privately he has shown that it is his child, or has called it as such in conversation, or looks after its education and maintainance.

"(3) When the mother was known to have lived in concubinage with the father during the pregnancy or birth of the child, or when the child was born while his parents were engaged to be married. (Relaciones amorosas.)

II.

These statutes, we beg to submit, are not merely prescriptive; but sections 137, act 1899, and 199, 1902, especially, are jurisdictional, in that they fix the time within which actions are to be commenced.

The Porto Rico statutes on prescription are found under a chapter devoted to that subject, beginning with section 1862, and ending with section 1875, both inclusive. The entire statute is silent as to actions affecting the rights of illegitimate children.

Counsel for appellees, as well as the majority opinion of the Supreme Court, treated Section 199, (anti) as a prescriptive law, and applied the principles of a statute of limitations. But we do not regard the law in question as such a statute. The right of the illegitimate child is treated by court and counsel as a vested right, whereas we present the right of action as a privilege granted to the illgitimate child who acts within the provisions of the law, and who must observe those legal requisites as a condition precedent if the privilege or right granted is to be exercised. At the time this action was brought, the plaintiffs had permitted two years to pass, and also the opportunity offered by the statute of 1899. The act of 1899 is not as liberal as the act of 1902; but that the statutory law invoked by both parties to the controversy may be before the court, in their entirety, we here present the Toro law, accepting the translation found in the record, p. 53.

"And so that there may be no doubt who are natural children, we order and command that said natural children are: those whose fathers at the time of birth or hereafter, could marry their mothers, without dispensation and the father should recognize them as such; in case he is not married, or where it was had with some other woman who is single: When these conditions are attendant upon said child we command that he is a natural child."

Under the Toro law, the action did not prescribe; there was no statute of limitations applicable, unless the general law would apply, and that is not contended for in this case.

Then came the act of 1899, Section 137, Civil Code of Porto Rico, as follows:

Section 137. The actions for the acknowledgment of

natural children can be instituted only during the life of the presumed parents, except in the following cases:

(1) If the father or mother died during the minority of the child, in which case the latter may institute the action before the expiration of the first four years of its majority.

(2) If, after the death of the father or mother, some instrument, before unknown, should be discovered in which the child is expressly acknowledged.

In this case the action must be instituted within six months following the discovery of such instrument."

Thus, in the case at bar, the plaintiffs would have been denied the right of action, because the same was not brought during the lifetime of the presumptive father, none of the exceptions existing in this case.

Then, we have the act of 1902 (supra) which permits the action within two years after the claimant becomes of age, whether the presumptive parent be dead or alive; or three acts:

(1) The Toro law, no time or limitation.

(2) The act of 1899, limiting the action to the life-time of the presumptive parent; with exceptions not applicable in this case; and,

(3) The act of 1902, requiring that the action be brought within two years after the child becomes of age, and with no other condition, save the exceptions which are not present in the case at bar; and regardless of whether the presumptive parent be dead or alive.

We submit that the last act, the act of 1902, was in force at the time this action was brought, and that it was a much needed, as well as a just and sensible law.

III.

The decision in the case at bar has in principle been several times reversed by the Supreme Court of Porto Rico, and the contention of the appellant sustained.

Josefa Desmornes did not appear as a witness; but Isabel testified (R. p. 16), "that she has no instrument of recog-

nition", etc, and therefore she resorts to different classes of testimony, which, under the law already cited (statutes, supra) she had a right to do. So that, as to this phase of the case, the only question remaining is the effect of the statute limiting the time in which the action may be brought.

Under the Toro law, the action for recognition did not prescribe, unless the general statute should be held to apply. But when the Spanish Civil Code, applicable in Porto Rico in 1899, repealed the Toro Law, Isabel was thirty five years of age. Until the death of Desmornes—the presumptive father—in November, 1905, (R. p. 21, f. 28) this action might have been brought during the life-time of Desmornes, giving the statutes of 1899 and 1902, a very liberal construction. At this time Isabel was at least thirty nine years of age. It is, then, perfectly clear that under the Law Toro, and the decree of 1899, the right of action had lapsed when it was finally brought.

Since the decision in the case at bar was rendered, holding the statute in question to be a statute of limitation merely, and necessary to be pleaded as provided in the code of civil procedure of Porto Rico, (referred to in the opinion of the court, supra) the Supreme Court of Porto Rico has, we respectfully submit, entirely changed its view.

We cite:

Gual et al vs Bonafoux et al
15 Porto Rico, (English) 542.

In this opinion, the court does not deal directly with the question at bar, but moves with caution in the direction of the view subsequently expressed, and herein urged.

Armsterdam et al vs Puente,
16 Porto Rico (English), p. 527.

The view contended for by appellant is more vigorously asserted in the case last above cited.

This principle is re-affirmed in:

Puente vs Puente,
16 Porto Rico (English), p. 556.

In Calaf vs Calaf, the Supreme Court of Porto Rico was emphatic in its enunciation of the principle herein contended for.

(This decision will appear in vol. 17, P. R. reports, and, we are advised, will be in the possession of this Honorable Court before this case is considered. In any event, the cause of Calaf vs Calaf is before this court on appeal, and the decision is of course in the record.)

In the decision last referred to, the Supreme Court of Porto Rico, quoting from a decision of the Supreme Court of Spain, giving the substance of the decision, says:

"The last decision quoted above clearly states that it **is true** that in the action the statute of limitations was not alleged as a bar, nor any citation made on the appeal of any section of the code relative to duration of actions other than Section 127 which is not **applicable**, and the said Supreme Court of Spain, in a decision rendered on the 19th day of December, 1902, notwithstanding the fact that it was on a question of recognition of a natural daughter born while the Toro Law was in force, affirms that it is not true that the said section 137 of the Spanish Civil Code does not provide a term for the exercise of the action on recognition, as it expressly provides four years immediately succeeding the date upon which the interested party becomes of lawful age."

Quoting further from the same opinion, the Court said:

"The action on recognition of Juan Ramon Calaf has been **extinguished by limitation**, whether under section 137 of the Spanish Civil Code, (1899) or section 199 of the Revised Code." (both supra.)

This is precisely our contention. The right of action was "extinguished". And this was true as to Isabel, under the Toro Law as well as under the Royal Decree of 1899, and the statute of 1902; for when this action was brought, more than twenty-one years had elapsed since she became of age, and the right of action had lapsed.

We do not find in the record any evidence as to the age of Josefa, except the statement made by the district court in its opinion, as follows:

"The death of Adolfo Desmornes, presumptive father of the plaintiffs ocurred in the month of November 1905, prior to the commencement of this action, and as the proofs show that plaintiffs reached their majority more than two years before the present code took effect, the action has prescribed by both laws."

Under these facts, if the time fixed was reasonable, it was impossible for the plaintiffs to maintain this action after the death of their presumptive father, or subsequent to March, 1902, when the present code became the law:

In Puente vs Puente, (supra), the Supreme Court of Porto Rico holds that the two year statute is reasonable, and as to the doctrine itself the court quotes this Honorable Court in Calaf vs Calaf as follows:

"it has been held by the Supreme Court of the United States": "This court has often decided that Statutes of limitation affecting existing rights are not unconstitutional, if a reasonable time is given for the commencement of an action before the bar takes affect. Hawkins vs Barney, 5 Pet. 451; Jackson vs Lamphire, 3 id. 280; Sohn vs Waterson, 17 Wall. 596; Christmass vs Russell, 5 id 290; Sturgis vs Crowninshield, 4 Wheat. 122. It is diffieutt to see why, if the Legislature may prescribe a limitation where none existed before, it may not change one which has already been established. Terry vs Anderson, 95 U. S. 832."

Prescriptive Statutes.—In this case the action is barred. —Comparison.—Remedy.

It appears to us that there is a clearly defined difference between the statutes in question, and the different state statutes of limitations. In the broad sense of the word, both classes are statutes of limitation; but one class is jurisdictional, and intented as such, while the other is a privilege, and is so stated. If a statute declares that after a note has been due for more than five years, and none of the requirements for the renewal of its life have been observed, the maker may plead the statute in bar, the plea is simply a privilege that has been established as a matter of public policy,

but the action has not been barred; the law does not declare the note to have been paid; the courts do not look with favor upon such statutes or such pleas, except in aggravated cases, while a man ruins his own credit by pleading this statute, if it be apparent that the plea is made to avoid an honest debt. Hence, the statute is little abused.

The statute under consideration is prescriptive, and it is more; it is prohibitive. It was, like the statute of limitations, enacted from the standpoint of public policy, but there the comparison ceases. The one gives to the defendant the privilege of pleading a bar to the claim or debt, but always leaves the issue open to controversy; the other bars the action itself; is a condition precedent to the invoking of the remedy. This, we believe, as shown herein, has become the settled doctrine of the Spanish and Porto Rican courts in the interpretation of those statutes.

And this suggests one more thought: The statute is remedial in character, and intended to give the illegitimate child a remedy, but in thus "tempering the wind to the shorn lamb", it was found necessary to combine with this remedy reasonable protection to property rights, with due regard for the interests of legitimate children. The case at bar is a powerful illustration of the necessity of the statute limiting the right of action. The only claimant appearing as a witness in this case was Isabel, (R. p. 16) and she had been of age for more than twenty years. On the night of her alleged father's death, she found the letters addressed to herself in the bottom of his trunk! Then, having allowed the Law Toro and the Royal Decree of 1899 to lapse, she brings her action.

A remedial statute controls and directs the manner and method of the remedy, but does not affect the right. But a remedial statute may be changed or modified at any time, and the procedure goes with it. This principle has, we think, been sufficiently set forth in the opinions cited herein construing this law, but in addition, we present the following:

Pretchard vs Norton, 106 U. S., 124-130.

Bank vs Donnelly, 8 Peters, 361.

Civil Code of Porto Rico, Section 1840, as follows:

"Prescription, which began to run before the publication of this code, shall be governed by the prior laws but if, after this Code became operative, all the time required in the same for prescription has elapsed, it shall be effectual, even if according to said prior laws a longer period of time may be required."

IV.

The Court erred as set forth in the fourth assignment of error, to-wit, in ordering judgment for the appellees.

The opinion of the district court, (R. p. 21) ordered "that judgment be entered in favor of the defendants". But the said court, in rendering judgment, did nothing more than "dismiss the complaint", etc. Nothing was given to the claimant Burnet. (R. p. 30-31.) This may have been for the reason that appellant had not proved his allegations of heirship set forth in his answer, or claim, and that this fact was overlooked when the opinion (R. p. 21) was written. Evidently, the district court, satisfied that the action, or right of action, had been extinguished, dismissed the cause without considering the rights of appellant, or calling upon him to sustain his denial of the recognition of appellees, (R. p. 26, f. 34), or to establish his own claim. If this deduction from the record is correct, it appears to us that the court erred in ordering the district court to enter judgment for the appellees as it is apparent that the appellant had not been heard at all.

The dissenting opinion not having been filed at the time the record was sent up, we direct attention to the fact that it will be found published with the case:

P. R. Rep., Vol. 13 (English) p. 28-29.

We respectfully submit that the dissenting opinion is in full accord with the views of the entire court as expres-

sed in later interpretations of the statute. The following paragraphs are from the dissenting opinion:

"I dissent because the necessity in this case for bringing an action within the time limited by Sec. 199 of the Civil Code was a condition precedent to the attainment of any right by the complainants, and being such a condition precedent, that the running of the statute of prescription could not be interrupted."

"In this case, moreover, the battle in the lower court was waged over the question of prescription. That court found that the action had prescribed, and even if the statute was capable of interruption or being waived, some regard was due to its action in the premises. The majority opinion is based upon the fact that there was no plea of prescription, and while this was true, when the case was sent back, the lower court should have been left free to permit amendments in order to raise the question really decided by it.

I am authorized to say that Mr. Justice MacLeary concurs in this dissent."

The above conclusion we believe to be important. Even while we do not believe that appellees could lawfully maintain an action after the approval of the act of March 1, 1902, yet, if it should be held that we are wrong in this contention, then the witnesses should have been subjected to cross-examination, or at least the privilege should have been extended. This is especially true under the extraordinary statements contained in the testimony of witness Isabel Desmornes. (R. p. 12.)

Mollan vs Torrance 9 wheat. 538.

Garland vs Davis, 4 How. 132.

We believe the Supreme Court of Porto Rico was in error as herein set forth, and that the cause should be sent back to the district court of Humacao, and the claimant Burnet permitted to prove his right to inherit the property in question.

Respectfully submitted,

Willis Sweet.

Attorney for Appellant.

No appearance for appellees.

MR. JUSTICE HOLMES delivered the opinion of the court.

This was a proceeding by the appellees as illegitimate children of Adolfo Desmornes, deceased to be adjudged his recognized children. The appellant answered that he was the nephew and heir of Desmornes and denied that the appellees were his children or ever were recognized as such. The District Court held that the action had prescribed under the limitations imposed upon actions of this class by the Civil Codes of 1889 and 1902. This decision was reversed by the Supreme Court on the ground that the bar to the action had not been pleaded, and a decree was entered for the appellees upon a consideration of the evidence taken below.

The case was argued in this court on behalf of the appellants only, and we shall content ourselves with discussing the argument made by them. By the Civil Code of 1889, Art. 137, actions of this kind 'can be instituted only during the life of the presumed parents,' with certain exceptions. It appears by the complaint that Desmornes died on November 2, 1905, before this suit was brought. By the statute of Porto Rico approved March 1, 1902, § 1001 Rev. Stat. and Codes, 1902, p. 821, under which the appellant says that the appellees proceed, 'An action to claim filiation may be filed at any time within two years after the child shall become of age,' &c. It appeared in evidence that the appellees became of age more than two years before this action was filed. It is urged that the words of both statutes are jurisdictional and establish a condition precedent. It is said further that the Supreme Court of Porto Rico in later decisions has ceased to distinguish or recede from the doctrine of the cases that [illegible] it has [illegible] to [illegible] as [illegible] than [illegible] as [illegible] as [illegible]

Whether prescription goes only to the remedy or extinguishes the right, it affects the jurisdiction no more than any other defence. When a court has general jurisdiction to try the question whether an alleged right exists the rules that determine the existence of the right ordinarily govern the duty only of the court, not its power. Its judgment that the right is established cannot be impeached collaterally by proof that the judgment was wrong. For instance, a common-law court ought not to give judgment for the plaintiff upon a parol promise without consideration, but if it does so the judgment is not open to collateral attack. Even words in a statute that might seem to affect the power of the court, such as 'no action shall be brought' in the Statute of Frauds, are assumed without question merely to fix the law by which the court should decide, as is explained in *Fauntleroy* v. *Lum*, 210 U. S. 230, 235. We see no reason why the ordinary rule should not apply to this case.

But it is said that, whether the statutes go to the jurisdiction or not, they establish a condition precedent. Of course all defences disclose conditions precedent to the successful maintaining of the action; but more than that must be meant, and we take the argument to be that the statute extinguishes the right if the suit is not brought in time and therefore creates a condition precedent to the right of the appellees. But that abstract proposition does not decide the case. The question before us is a question of pleading, and not every matter that may affect the existence of the right at the time of bringing suit must be dealt with by the plaintiff in stating his cause of action. A release under seal destroys a right as fully as prescription could, yet a plaintiff does not have to deny a release in his declaration. Usually, if facts have arisen since the cause of action accrued that take it away, it is more convenient and it is required that the defendant should allege them, rather than that the plaintiff should be called

on to deny in the first place all possible matters of that sort. *Sawyer* v. *Boston*, 144 Massachusetts, 470, 472. "For if he should do so, the declaration would be more prolix than was convenient." *Hawkings* v. *Billhead*, Cro. Car. 404. "The mere fact that the time of bringing suit goes in some sense to the jurisdiction of the court does not necessarily take the case out of the general rules of pleading." *Sawyer* v. *Boston*, 144 Massachusetts, *supra*. It would seem, as observed by the court below, that the defendant was free to renounce the objection if he saw fit. We know of no public policy that would prevent his permitting the appellees to acquire rights that earlier they were entitled to. So that on this ground as well as on that of convenience we are of opinion that the general rule of pleading applies.

The only matter remaining to be mentioned is a suggestion that the Supreme Court should have sent the case back to the lower court to give the appellant an opportunity to cross-examine the appellees, but there being no question of the power of the Supreme Court we should be slow to control its discretion on this point.

Judgment affirmed.